

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG 7 1961

Joseph W. Stewart
BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,325

570

GENERAL HEATING ENGINEERING COMPANY, INC.
D'APRILE BROTHERS COMPANY,
ARTHUR G. BRADLEY,

Appellants,

v.

DISTRICT OF COLUMBIA,

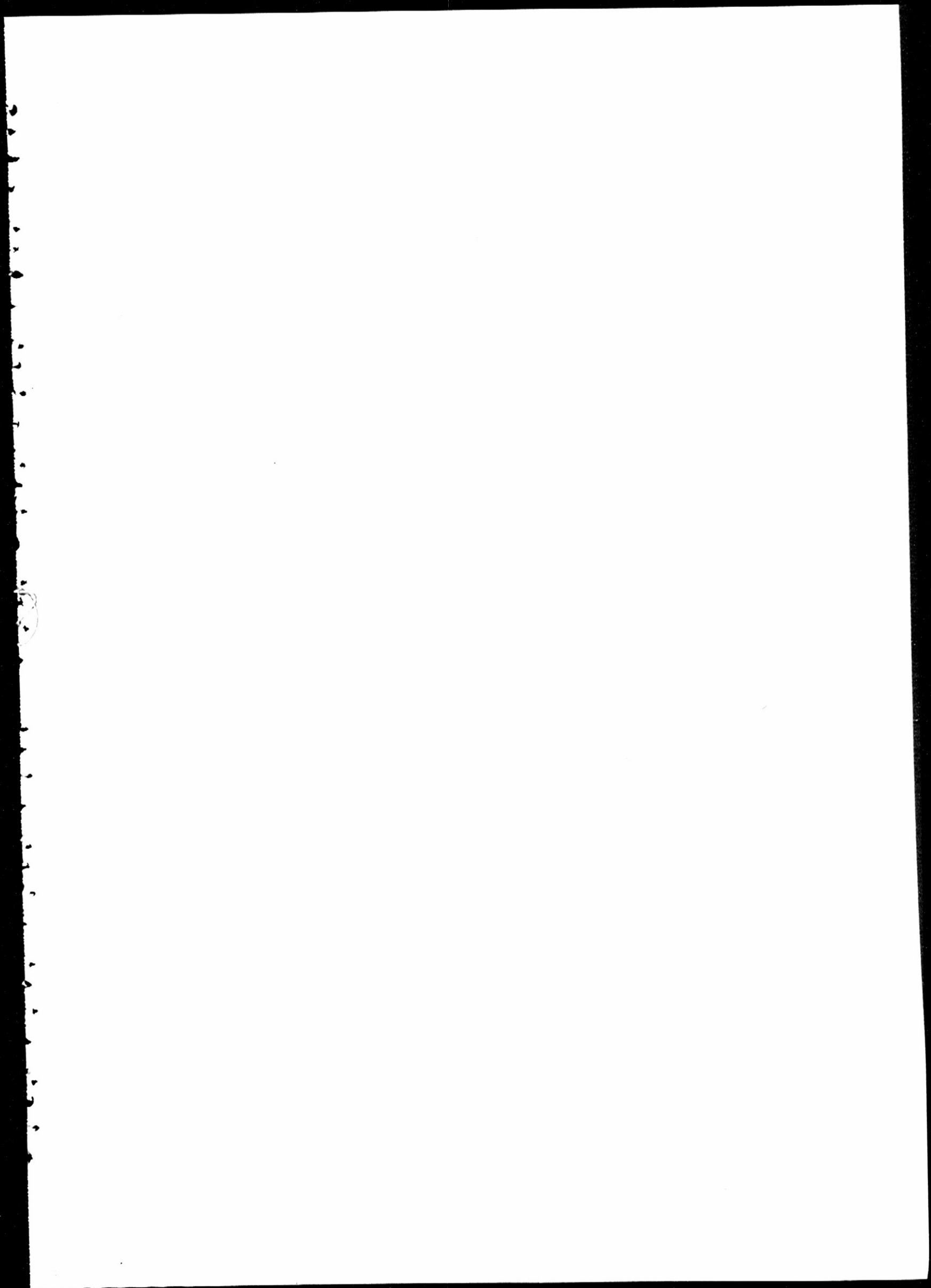
Appellee.

APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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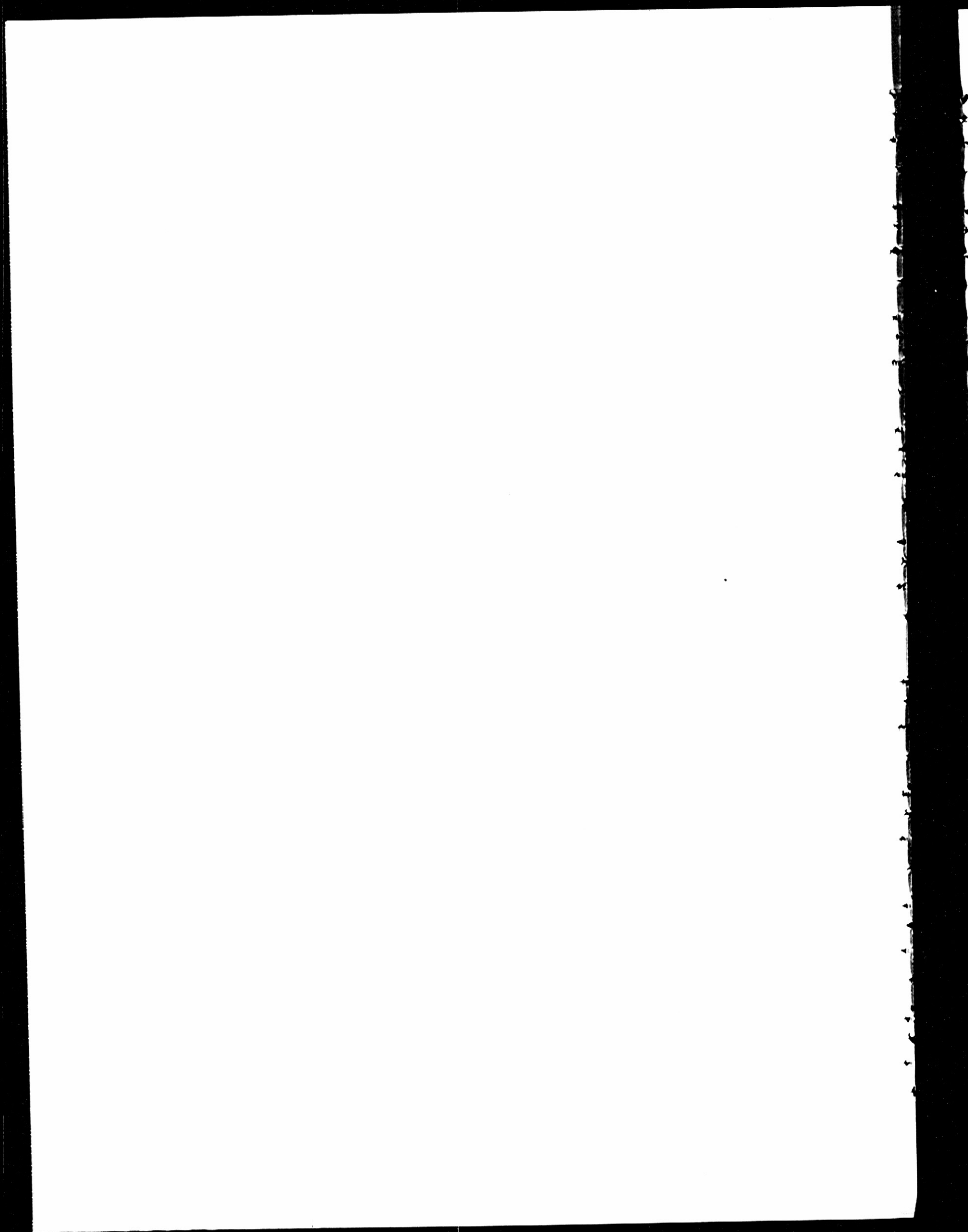


STATEMENT OF THE QUESTIONS PRESENTED

In the opinion of appellants, as stated in their brief in support of petition for allowance of an appeal from the Municipal Court of Appeals, the questions are:

1. Can the District of Columbia by contract relieve itself from liability for the consequences of its own negligence in failing to carry out its duty to maintain the streets of the District of Columbia in a reasonably safe condition?

2. Can the language of an excavation permit (contract in question) which does not expressly state that the applicant agrees to save the District of Columbia harmless from liability for its own negligence, and which specifically refers to "negligence of the applicant" as a basis for indemnity in another clause, be nevertheless construed as exculpating the District of Columbia from the consequences of its own negligence?



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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,325

GENERAL HEATING ENGINEERING COMPANY, INC.,
D'APRILE BROTHERS COMPANY
ARTHUR G. BRADLEY,
Appellants,

v.

DISTRICT OF COLUMBIA,
Appellee.

APPEAL FROM THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action which was instituted in the Municipal Court for the District of Columbia by appellee seeking indemnification of the amounts paid by it in satisfaction of judgments rendered against it in an earlier suit. Jurisdiction of the Municipal Court was founded upon the provisions of Title 11, §703, of the Code of Laws for the District of Columbia, 1951 Edition.

Appellee appealed the judgment entered against it to the Municipal Court of Appeals for the District of Columbia. The jurisdiction of the Municipal Court of Appeals for the District of Columbia is founded upon the provisions of Title 11, §772, of the Code of Laws for the District of Columbia, 1951 Edition.

After reversal of the judgment of the Municipal Court by the Municipal Court of Appeals and a denial of a motion for rehearing, appellants filed a petition to this Court for an allowance of an appeal and by order of this Court signed June 14, 1961, said petition was allowed. Jurisdiction of this Court is founded upon the provisions of Title 11, § 773, of the Code of Laws for the District of Columbia, 1951 Edition.

STATEMENT OF THE CASE

For the purposes of this brief, appellant General Heating Engineering Company, Inc. will be sometimes referred to as General Heating, appellant D'Aprile Brothers Company as D'Aprile Brothers, appellant Arthur G. Bradley as Bradley, and appellee District of Columbia as the District.

The issues presented here involve two suits instituted in the Municipal Court for the District of Columbia. The first suit, Rose Boorstein and Harry Boorstein v. General Heating Engineering Company, Inc. and D'Aprile Brothers Company and the District of Columbia, being Civil Action File No. M21780-58, was tried before Judge Burnett commencing on April 20, 1959 and concluding on April 22, 1959 with a jury verdict in the total amount of Twenty-five Hundred Dollars (\$2500.00) returned against the District of Columbia only (J.A. 5). A verdict was directed by the Court for the other defendants (J.A. 5). The second suit, entitled District of Columbia v. General Heating Engineering Company, Inc., D'Aprile Brothers Company and Arthur G. Bradley, being Civil Action File No. M21998-59, was an action for indemnification of the amount paid by the District of Columbia in satisfaction of the judgments

in the first suit. This suit also resulted in a verdict by direction of the Court in favor of defendants (appellants herein) (J.A. 2, 21).

In the earlier case, plaintiffs Rose and Harry Boorstein sued for damages for personal injuries and property damage sustained as a result of the negligence of all defendants in failing to maintain an excavation in a public roadway in a reasonably safe condition (J.A. 37-39). (Appellant Arthur G. Bradley was not a defendant in this case). The evidence adduced at this trial disclosed that in the late evening of June 23, 1957 during a heavy rainstorm these plaintiffs were proceeding along Primrose Road, N.W., Washington, D.C. in their automobile when it dropped into an excavation in the roadway, causing them injuries. About two weeks earlier, appellant General Heating Engineering Company, a subcontractor of appellant D'Aprile Brothers Company, had caused a cut to be made across a part of this road for the purpose of connecting water and sewer lines from a private home to the main water and sewer lines under the street. This cut was completed, refilled and packed with dirt on June 12, 1957, two days after it was opened (J.A. 46).

Before making this cut, applications therefor were made to the District and permits obtained for excavating in a public street (J.A. 14, 15, 22-31). Appellant Bradley, a master plumber, signed the application for permits (J.A. 23, 27). In accordance with the practice established by the District, an applicant for such permit must send a postcard to the Department of Highways after any cut of a public roadway has been filled since one of the conditions on the application for such permit is that repairing and resurfacing of the street where such cut is made will be performed by the District of Columbia at the expense of the applicant (J.A. 23, 26, 42). Evidence was offered through Mr. Yingling, President of General Heating Engineering Company, that on the Thursday, June 13, 1957, after the cut was made and filled he mailed such a postcard to the Coordinator of Releases, Department of Highways, Room 20, 14th and E Streets, N.W., Washington, D.C., for the purpose of notifying the District thereof (J.A. 43). The District did not resurface or repair the afore-

mentioned cut before the plaintiffs' accident, which occurred about ten days after General Heating had notified the District of the completion of the cut by the aforementioned postcard (J.A. 43, 44). During the late afternoon of June 23, 1957, a Sunday, there was a sudden heavy rainstorm and, due to the angle of the street, great quantities of water traveled over the filled cut, gutting it, causing holes, and making the condition which caused plaintiffs' injuries that day.

During the trial of the Boorstein case, there was no evidence offered that either General Heating or D'Aprile Brothers was negligent and, accordingly, the Court directed a verdict in their favor (J.A. 5). The issue of the District's liability, i.e., whether or not it failed to resurface or repave the said filled excavation within a reasonable time after notification to it by General Heating, was submitted to the jury for its determination. Pertinent portions of the Court's charge are quoted below (J.A. 42):

"Now we are going to consider just what negligence would be sufficient for you to base your verdict upon. We have seen in this case that the contractor who made the cut in the road into which the plaintiff husband says his car ran had to make an application to the District of Columbia for permission to make that cut and he got a permit which allowed him to make the cut. Among other things this permit that the contractor received to make the cut provided that the contractor, the General Heating Company, will comply with all conditions as set forth herein — that means in the permit — as well as within the conditions set forth on the form of application submitted by and on behalf of the permittee in connection with the issuance of the permit.

"Now one of the conditions with which you will be concerned on this application is that the repairing and resurfacing of the street where this cut was made will be performed by the District of Columbia at the expense of the applicant. That simply means that the repairs to the roadway can be made only by the District of Columbia and that they are to be made at the expense of the person who made application for the cut.

"The person who made the application for the cut, under the provisions as enumerated by the District of Columbia, had no right to repair the top of that road. It

had the duty of making the fill there after it made the cut; it had to make what is technically called a back-fill or what to you would be just an ordinary fill; in other words they had to fill up the hole which they had made. They had to fill it in a workmanlike manner.

"Now, had they filled it in a wrongful manner and the way in which they filled it contributed to the accident which occurred here the contractor would be responsible, but in this particular case we have the evidence that after the cut was made by the General Heating Company, Mr. Yingling had a card which he got from the District of Columbia, and this is the card which was provided by the District of Columbia, its agents, servants or employees. It was directed to the Co-ordinator of Releases, Department of Highways, Room 20, 14th and E Streets, Northwest. He testified that on the Thursday after the cut was made he mailed this card to the District of Columbia.

"The District of Columbia, having provided this postal card, is assumed to have adopted the post office as its agent for the delivery of this card. So when Mr. Yingling delivered this card or a similar card — he didn't say this card, but a similar card — into the hands of the Post Office Department, then, so far as the law is concerned, that was in the hands of the District of Columbia, but they are not to act upon this card until they receive it.

"There is no evidence here as to when they received the post card, so you, exercising your ordinary common sense, are to determine approximately when they received this card. You are instructed that if you find that the thing which caused the hole into which Mr. Boorstein's automobile ran was the failure of the District of Columbia to cover the top of the back fill — that is, the top of what was put into the hole — with two inches of black-top or similar materials, within a reasonable time after the receipt of the notice mailed by the witness Yingling on June 13, 1959, and before the accident on the night of June 23, 1959, then the District of Columbia was negligent, and it is liable to Mr. Boorstein, one, for damages to his automobile if any you find; two, for his medical expenses if any you find; and three, for Mrs. Boorstein's medical expenses — that is, Mr. Boorstein — if you find he paid them and she suffered them, he is the one that is to obtain the benefit of any verdict for that expenditure and not Mrs. Boorstein. And the District of Columbia is liable to both Mr. and Mrs. Boorstein individually for the personal injuries of each including his or her pain and suffering resulting therefrom if any.

"Now then, you are to determine whether or not the District of Columbia, as I say, had a reasonable opportunity to cover this cut with a bituminous material which the witness Chism told you about. In determining whether or not the District had a reasonable opportunity you must realize that this card was mailed on a Thursday, and you are to say whether in your judgment you think the District might or did receive it on Friday; or, you are to consider whether or not in your opinion the District of Columbia may have received it on the following Monday, which was the 17th, because we all know that the District of Columbia offices do not operate on Saturday or Sunday.

"Now, if they received it on Friday they had the following week or five days to work on it — six days including Saturday if they wanted to employ persons on that day so to do. You are to make up your own minds as to whether or not the time that elapsed from the time they may have gotten (it) was a sufficient amount of time to give them a reasonable opportunity to cover this cut that was there.

"If you find that they did have reasonable time and that they failed to cover this cut as I have indicated then they are liable. On the other hand, if you believe that they did not have reasonable time and that operating within the bounds of reason for a large concern such as the District of Columbia — if they did not have a reasonable amount of time then your verdict must be for the defendant."

The jury found, in accordance with the Court's instructions, that the District was negligent and awarded damages accordingly. No other appeal or other proceeding to set aside the judgment in the Boorstein case was taken (J.A. 46).

The District satisfied these judgments (J.A. 44), and on July 22, 1959 commenced its action in the Municipal Court for the District of Columbia against appellants for indemnification of the amount paid to the Boorsteins (J.A. 3-6). On April 12, 1960 the trial of this suit commenced before Judge Barlow. During the course thereof, the District introduced exhibits which included permits and applications for permits for the building and cuts (J.A. 14-16, 22-36). The material clauses respecting the claim of indemnification are as follows (J.A. 22):

"(3) That the applicant, at the applicant's risk and expense, guarantees that the public space occupied by the applicant or required for the performance of the work authorized by the said permit, at all times will be kept in a safe condition, and where the work aforesaid results in any excavation in any street, alley, sidewalk, or other public space, the applicant will insure that such excavation is kept in a safe condition until such street, alley, sidewalk, or other public space has been repaired or resurfaced by the District of Columbia. The repair or resurfacing of the street, alley, sidewalk or other public space made necessary by the excavation, will be performed by the District of Columbia at the expense of the applicant."

* * *

(J.A. 23):

"(5) That the applicant will save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application. * * *."

The permit in question contained the following language (J.A. 30):

"The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify or keep indemnified the District of Columbia from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent, servant, employee or contractor of the Permittee; that the Permittee will comply with all conditions set forth herein, as well as with the conditions set forth on the form of application submitted by or on behalf of the Permittee in connection with the issuance of this permit, and that the Permittee will perform the work authorized by this permit, in accordance with the application and plan(s) filed therefor, both of which have been approved by and are on file with the District of Columbia, and in accordance with all applicable laws and regulations of the District of Columbia."

After introduction of the applications and permits and receiving testimony in regard thereto, the District rested its case. No evidence was offered

that any of appellants were in any respect negligent regarding the excavation in question (J.A. 46).

(From page 904, Municipal Court of Appeals decision, 168 A. 2d:)

"We agree that the prior action established that, so far as the Boorsteins were concerned, the District was negligent in failing to resurface the cut within a reasonable time, and that the injuries suffered by the Boorsteins did not result from any negligence on the part of either D'Aprile Brothers or General Heating."

Motions for directed verdicts were made on behalf of all appellants (J.A. 19-21) and the Court granted these motions on April 12, 1960 (J.A. 21), Judgment was entered on April 18, 1960 and the District filed a notice of appeal to the Municipal Court of Appeals on April 28, 1960 (J.A. 2).

Arguments were heard in the Municipal Court of Appeals on November 21, 1960 and on March 30, 1961 the Municipal Court of Appeals handed down its opinion reversing the judgment of the Municipal Court holding that the language of the indemnity provision of the permit is "so broad and comprehensive that although it contains no express stipulation indemnifying against a party's own negligence, it accomplishes the same purpose"; and that "it was not unreasonable for the District to require that it be indemnified against its liability to the public for its own negligence" (J.A. 45-47). Judge Cayton dissented without opinion. A motion for rehearing and reconsideration on behalf of appellants was filed on April 7, 1961 and denied on April 24, 1961 (J.A. 48). A petition for allowance of an appeal to this Court was filed May 1, 1961 and granted on June 14, 1961 (J.A. 49).

STATEMENT OF POINTS

The points that will be relied on by the appellants in the above entitled cause are that the Municipal Court of Appeals erred in holding that:

1. The District of Columbia by contract can relieve itself from liability for the consequences of its own negligence in failing to carry out its duty to maintain the streets of the District of Columbia in a reasonably safe condition.
2. The language of an excavation permit (contract in question) which does not expressly state that the applicant agrees to save the District of Columbia harmless from liability for its own negligence and which specifically refers to "negligence of the applicant" as a basis for indemnity in another clause, can be construed as exculpating the District of Columbia from the consequences of its own negligence.

SUMMARY OF ARGUMENT

The District of Columbia in granting its citizens the right to excavate in a public street may do so upon terms that give reasonable protection to the District against suits for damages resulting from negligent excavations by such applicants and in which the District would be vicariously liable therefor. To force upon the public terms on an application for an excavation permit which they must sign to avail themselves of the right to use public space, which would not only afford this reasonable protection but which would exculpate the District from the consequences of its own negligent acts pertaining to its duties under the application, would be taking unconscionable advantage of its position and such a practice would be against public policy.

Appellants applied for and were granted permission to excavate in a public street for the purpose of connecting the water main and public sewer to a house under construction. Among the terms of the application

the District granted unto itself only the right to resurface or repair the excavation after it was filled by appellants. It failed to perform its duty under the said application and, the jury in a suit for damages filed by plaintiffs Boorstein against the District and some of the appellants for personal injuries resulting when their automobile ran into a rain-gutted excavation in a roadway rendered a verdict against the District, and the District thereafter brought a suit for indemnification against appellants for the amount paid in satisfaction of the Boorstein judgments.

Admitting as a premise that there was no negligence on the part of any of appellants concerning the excavation in question, the Municipal Court of Appeals nevertheless resolved the question as to whether the District is entitled to indemnity from appellants for the results of its own negligence, i.e., in failing to resurface or repair the aforesaid excavation within a reasonable time, in the affirmative, by adopting a construction of the indemnifying language in the excavation permit contrary to overwhelming authorities, including decisions of this Court. The Municipal Court of Appeals considered as authority for its holding a decision of that Court (Princemont Construction Corp. v. Baltimore & Ohio R. Co., *infra*) which dealt with the right of private concerns dealing at arm's length to indemnify one against its own negligence, although the case at bar admits of an obvious inequality in bargaining power and a clear duty of public service.

Moreover and aside from the public policy issue, a strict construction of the indemnifying language in both the application and the permit as required by the decisions of this Court and authorities elsewhere, would not justify the conclusion reached by the Municipal Court of Appeals for:

1. " * * * negligence of the applicant" is expressly made the basis for indemnity in one clause of the application; and, as heretofore stated, the applicant (appellants) was not negligent.

2. An express condition precedent to any right of indemnification to the District is "the use of Public Space by the Permittee", and appellants' use of public space had terminated at the time of the accident to plaintiffs.

The decision of the Municipal Court of Appeals is manifestly unjust and it creates an overwhelming burden on applicants for excavation permits to expect them, without consideration, to assume responsibility for the District's negligence in failing to carry out its duties under an application which it unilaterally drafted. And, its construction of the indemnifying language in the application and permit might well lead to a want of care and carelessness on the part of the District in the performance of its municipal duties in connection with public streets.

ARGUMENT

1. IT IS CONTRARY TO PUBLIC POLICY FOR THE DISTRICT OF COLUMBIA TO DEMAND THAT IT BE INDEMNIFIED AGAINST LIABILITY TO THE PUBLIC FOR ITS OWN NEGLIGENCE IN FAILING TO MAINTAIN THE STREETS THEREOF IN A REASONABLY SAFE MANNER.

The District of Columbia, a municipal corporation, has the duty of maintaining the streets of the District of Columbia in a reasonably safe manner. District of Columbia v. Woodbury, 1890, 136 U.S. 450, 10 S.Ct. 990, 34 L.Ed. 472. For those private individuals or concerns who wish to excavate in the streets for their own purposes an application for permit for such excavation must first be made and granted by the District. The applications and permits which were introduced in this case as plaintiff's exhibits 1 through 5 gave the right to appellants to cause the cut in question to be made on Primrose Road, N.W., Washington, D.C. for the purpose of connecting the water main and public sewer to a house then being constructed by D'Aprile Brothers, which engaged General Heating to do the plumbing and heating work. Among the terms of the aforementioned application for excavation (which is a standard form) we find the following language:

(J.A. 26):

" * * * the applicant will insure that said excavation is kept in a safe condition until such street, alley, sidewalk or other public space has been repaired or resurfaced by the District of Columbia. The repair or resurfacing of the street, alley, sidewalk, or other public space made necessary by the excavation will be performed by the District of Columbia at the expense of the applicant." (Emphasis added)

The evidence disclosed that after completion of the cut on or about June 12, 1957 the District of Columbia was notified thereof by a postcard furnished General Heating by the District. In addition, a district inspector certified on June 12, 1957 that the work in the street was properly done (J.A. 29). Only the District, as indicated by the terms of its application, could resurface or repair the fill (J.A. 42).

(Charge of the Court)

"The person who made the application for the cut, under the provisions as enumerated by the District of Columbia, had no right to repair the top of that road. It had the duty of making the fill there after it made the cut; it had to make what is technically called a back-fill or what to you would be just an ordinary fill; in other words they had to fill up the hole which they had made. They had to fill it in a workmanlike manner."

On June 23, 1957 a heavy rainstorm occurred washing out a portion of the fill which had not been resurfaced or repaired by the District causing holes into which the automobile of plaintiffs Boorstein ran resulting in injuries to the Boorsteins. The jury found that the District of Columbia was negligent in failing to resurface the cut within a reasonable time, the specific issue of the District's negligence having been submitted to them by the Court with the following language (J.A. 44):

"Now then, you are to determine whether or not the District of Columbia, as I say, had a reasonable opportunity to cover this cut with a bituminous material which the witness Chism told you about. In determining whether or not the District had a reasonable opportunity you must realize that this card was mailed on a Thursday, and you are to say whether in your judgment you think the District might or did receive it on Friday; or, you are to consider whether or not in your opinion the District of Columbia may have received it on the following Monday, which was the 17th, because we all know that the District of Columbia offices do not operate on Saturday or Sunday.

"Now if they received it on Friday they had the following week or five days to work on it — six days including Saturday if they wanted to employ persons on that day so to do. You are to make up your own minds as to whether or not the time that elapsed from the time they may have gotten (it) was a sufficient amount of time to give them a reasonable opportunity to cover this cut that was there.

"If you find that they did have reasonable time and that they failed to cover this cut as I have indicated then they are liable. On the other hand, if you believe that they did not have reasonable time and that operating within the bounds of reason for a large concern such as the District of Columbia — if they did not have a reasonable amount of time then your verdict must be for the defendant."

No appeal was taken from the judgments rendered in favor of the Boorsteins and the District thereafter sought indemnification against appellants solely on the basis of the alleged exculpatory clauses in the applications and permits issued to appellants which the Municipal Court of Appeals construed as containing language broad enough so as to relieve the District from the consequences of its own negligent acts.

As a basic proposition, indemnity agreements will be strictly construed and a contract of indemnity will not be construed to indemnify the indemnitee against his own negligence unless it clearly appears that such was the intention of the parties. Maiatico v. Hot Shoppes, Inc., 1961, ___ U.S. App. D.C. ___, 287 F.2d 349; Kay v. Cain, 1946, 81 U.S. App. D.C. 24, 154 F.2d 305; 12 Am. Jur. §183, pp. 683, 684.

Moreover, the law seems well settled that under certain circumstances because of the peculiar position of the parties to an indemnity contract one may not validly exempt itself of liability for negligence. This is true with respect to common carriers (New York Central Railroad Company v. Lockwood, 17 Wall 375, 21 L. Ed. 627), lease agreements between landlord and tenant where there is unequal bargaining power, (Kay v. Cain, *supra*) p. 306, 154 F.2d:

" * * *. Moreover, it is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid. The acute housing

shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy.",

public utilities (Fairfax Gas & Supply Co. v. Hadary, 1945, 4th Cir., 151 F.2d 939), etc.

In 17 C.J.S., Contracts §262, p. 645 it is stated:

"The rule against such contracts is frequently limited to the principle that parties cannot stipulate for protection against liability for negligence in the performance of a legal duty or a duty of public service, or where a public interest is involved or a public duty owed, or, when the duty owed is a private one, where public interest requires the performance thereof, or where the party to whom the private duty is owed is compelled to submit to such stipulation for exemption."

There is a wide variance in cases which concern private parties dealing at arm's length whereby one of the parties is indemnified for the consequences of his own negligent acts. Such contracts have been allowed when the terms thereof are clear and unequivocal, but where there is unequal bargaining power or where there is a relationship involving public service such clauses have been deemed invalid. In 6 Williston on Contracts §1751C (Revised Ed.), p. 4968, it is stated:

"There are three bases for deciding that a bargain, otherwise valid, which exempts one from future liability to another that would arise except for the bargain is invalid because the parties are in a certain relationship to each other. First, some relationships are such that once entered upon they involve a status requiring of one party greater responsibility than that required of the ordinary person, and, therefore, a provision avoiding liability is peculiarly obnoxious. Second, in many relationships there is a situation where one person is dealing contemporaneously with several others, so that a bargain limiting his liability to one of them is considered to have a tendency to lead to conduct injurious to others. Third, a relation often represents a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantages of the relation. These reasons are not necessarily exclusive of one another."

"In general, however, wherever there is a relationship involving public service, a bargain exempting the public utility from its duties as such is invalid. Particular applications and limitations of this principle have been noted previously with respect to railways, air transportation, and telegraph companies. The principle has also been applied to municipalities while performing duties of public service, telephone companies, public docks, irrigation districts, and even companies manufacturing elevators. * * *." (Emphasis supplied)

See also 2 Restatement of Contracts, American Law Institute, §575.

The Municipal Court of Appeals in citing their case of Princemont Construction Corporation v. Baltimore and Ohio R. Co., 1957, D. C. Mun. App., 131 A. 2d 877, as authority for their holding, apparently considered the case at bar to be governed by the same reasoning that would apply to private individuals or concerns dealing at arm's length. Clearly, there was no preliminary discussion or negotiation between the applicant and the District over what provisions shall be contained therein, as such terms have been unilaterally determined in advance by the District and set forth in a standard form printed for the applicant's signature. There was not only unequal bargaining power but in fact no bargaining power. Simply stated, the appellants had but one choice — that of either signing the applications as written or being denied the right to work on the city streets.

The far reaching effect of the Municipal Court of Appeals decision in this case would be to hold every person who signed an application for such a permit to excavate in the public streets liable for any negligence of the District of Columbia in regard thereto although such person would gain no benefit or consideration for the added burden or responsibility nor could he in any way control the actions of the District of Columbia. This result might well induce a want of care, indifference or carelessness on the part of the District of Columbia in the performance of its municipal duties which would be contrary to public policy.

II. ASIDE FROM THE PUBLIC POLICY ISSUE, NEITHER THE APPLICATIONS NOR PERMITS IN QUESTION CONTAIN UNEQUIVOCAL LANGUAGE WHICH WOULD JUSTIFY THE CONCLUSION REACHED BY THE MUNICIPAL COURT OF APPEALS.

(a) " * * * negligence of the applicant" is expressly made the basis for indemnity in one clause of the application.

Section (5) of the conditions of application and permit contains the following language (J.A. 27):

"(5) That the applicant will save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application. (Emphasis supplied)

Therefore, although the permit itself does not expressly refer to the negligence of the applicant as a basis for indemnity, nevertheless, the terms of the application, which should be read together with the permit to obtain the total effect thereof, refer to negligence of the applicant as a basis for indemnity. Moreover, the permit does not expressly set forth an agreement whereby the applicant agrees to indemnify the District for its own negligent acts. Accordingly, at most, there is an ambiguity and under the basic principle of strict construction against the drafter of the instrument this ambiguity must be resolved against the District. This is especially true where a contrary effect would give indemnity against one's own negligence.

In the very recent Maiatico case, supra, this Court considered an agreement between a landlord and a tenant which contained a clause that if the building is "partially damaged by fire * * * the damages will

promptly be repaired by and at the expenses of the landlord". A fire originated in the building damaging the leased premises which was caused by the tenant's negligence. The question was whether the above quoted language included within its scope damages resulting from the tenant's negligence. The Court ruled against this construction and reversed the lower Court's findings, stating on page 350, 351, 287 F. 2d:

"At one time, as we know, the law did not permit a person to exculpate himself by contract from the legal consequences of his negligence. E.g., *Brown v. Postal Tel. Cable Co.*, 1892, 111 N.C. 187, 16 S.E. 179, 17 L.R.A. 648. Although the modern law allows such exculpation in most circumstances,¹ it is well established that exculpation must be spelled out with such clarity that the intent to negate the usual consequences of tortious conduct is made plain." (Citing cases.)

¹ (But see *Kay v. Cain*, 1946, 81 U.S. App. D.C. 24, 154 F.2d 305.

* * *

"In short, the law requires that any alteration of the 'familiar rules visiting liability upon a tortfeasor for the consequences of his negligence'² must be clearly and unambiguously expressed. No particular form or words are needed but the intent to waive negligence must be clear."

² *Boston Metals Co. v. The Winding Gulf*, 1955, 349 U.S. 122, 123-4, 75 S.Ct. 649, 650, 99 L.Ed. 933.

In *City of Boston v. Boston Edison Company*, 1958, 1st Cir., 260 F. 2d 872, plaintiffs sustained damages to their home as a result of a broken city water main and brought suit against the City of Boston and the Boston Edison Company, which filed cross-claims against each other. The City claimed that Boston Edison Company installed a steam main in a negligent manner and in violation of the permit given by the City and therefore that it should be indemnified because of this language (p. 879):

any person maintaining a structure under a street "" shall do so only on condition that such maintenance shall be considered as an agreement on his part with the city to keep the same and the covers thereof in good repair and condition at all times during his ownership and to indemnify and save harmless the city against any and all damages, costs, expenses, or compensation which it may sustain or be required to pay, by reason of such excavation or structure being under or in the street, or being out of repair during its ownership * * *."

The City, however, after notice of an unusual flow of water near where the break later occurred failed to take any corrective action. The Court held that the agreement of indemnity as quoted above could not, as a matter of interpretation, be considered as intended to save the City harmless from the consequences of its own subsequent independent negligence and the City was held liable on the cross-complaint of Boston City Edison Company.

In harmony with these decisions see Wright v. City of Richmond, 1926 146 Va. 835, 132 S.E. 707, where a release of the City from all claims against it from extension and grading of an avenue was construed not to include negligent execution, construction or maintenance of the work by the City.

A similar "release" in an ordinance in City of Richmond v. Virginia Bonded Warehouse Corp., 1927, 148 Va. 60, 138 S. E. 503, proffered by the City as exculpating itself for the consequences of its own negligence was rejected, the Court stating on p. 508:

"It is an all-sufficient answer, however, to this assignment of error, to say that negligence on the part of the city was not in the contemplation of the parties, and that the city had not contracted against its own negligence, even if it could have done so."

- (b) An express condition precedent to any right of indemnification to the District is the "use of Public Space by the Permittee", and appellants' use of public space had terminated at the time of the accident to plaintiffs.

The permit for excavation in the case at bar contained the following language (J.A. 30):

"The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify and keep indemnified the District of Columbia from any costs, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent, servant, employee or contractor of the Permittee; * * *." (Emphasis supplied).

Looking at the language of the permit underscored above, appellants were not using public space at the time of the Boorsteins' accident. The evidence disclosed that they had turned it back to the District ten days earlier and the permit itself for the use of space expired three days before the accident (J.A. 30). Hence, as applied to these facts, only a strained construction of the above quoted language would suggest an interpretation that the District should be held harmless for its negligence in failing to resurface the filled excavation. Such an interpretation runs contrary to the decisions of an overwhelming majority of authorities considering this issue and involving parties other than municipalities. For example, see: Standard Oil Company of Texas v. Wampler, 1955, 5th Cir., 218 F.2d 768; Chicago & N.W. Ry. v. Chicago Packaged Fuel Co., 1952, 7th Cir., 195 F.2d 467, cert. den. 344 U.S. 832; Standard Insurance Company of New York v. Ashland Oil and Refining Company, 1950, 10th Cir., 186 F.2d 44; Southern Ry. Co. v. Coca Cola Bottling Company, 1944, 4th Cir., 145 F.2d 304; Burns v. N & L Realty Corp., 1958, 160 F.Supp. 203; Walters v. Rao Electrical Equipment Company, 1942, 289 N.Y. 57, 43 N.E.2d 810, 143 A.L.R. 308. See also July 1958 edition of the Insurance Counsel Journal entitled "Indemnity Agreements" beginning at p. 326, concluding with the majority rule citing 175 A.L.R. 8, 29 (p. 332):

"' In the overwhelming majority of the cases the result reached by interpretational efforts can be condensed into the single rule that where the parties failed to refer expressly to negligence on their contract, such failure evidences the parties' intention not to provide for indemnity of the indemnitee's negligent acts.' "

Considering all the material clauses in the applications and permits we find the applicant must:

1. maintain the excavation in a safe condition until it is resurfaced by the District (Clause (3) in application, J.A. 22).

2. save harmless and indemnify the District from all claims, etc. which it may be subject to due to negligence of applicant (Clause (5) in application, J.A. 23).
3. backfill excavation within twenty-four hours in the manner set forth in Clause (7), (J.A. 24).
4. complete work in the shortest possible time without interference with traffic unless specifically authorized (Clause (8) (a) in application, J.A. 24).
5. save harmless and indemnify the District from any cost, etc. by reason of injury to persons resulting from the use of public space (reverse side of permit, J.A. 30).

Interpolating then, a right of indemnification exists when an applicant fails to maintain an excavation in a reasonably safe manner before the District resurfaces it and by reason of which failure the District is held vicariously liable to the injured party. These are not the facts in the case at bar for the Municipal Court of Appeals concedes that no negligence was proved on the part of any of appellants and hence no vicarious liability could attach. Moreover, it is conceded that, as respects the Boorsteins, the District was negligent in failing to resurface the filled excavation in a reasonable time as required by the terms of the application. Nevertheless, a construction by the Municipal Court of Appeals was made of the clauses of the applications and permits so as to exculpate and relieve the District of a breach of its own agreed duty under the application which it alone drafted. It is submitted that this construction is manifestly erroneous.

The Municipal Court of Appeals in addition went a step further to exonerate the District. It apparently applied a double standard with respect to "reasonable time", one by which the District is governed and the other for private citizens, as its opinion indicates; p. 904, 168 A. 2d:

"We agree that the prior action established that, so far as the Boorsteins were concerned, the District was negligent in failing to resurface the cut within a reasonable time, and that the injuries suffered by the Boorsteins did not result from any negligence on the part of either D'Aprile Brothers or General Heating. The question here, however, is whether the District is entitled to indemnity from the results of its own negligence."

but then, at p. 905:

" * * *. Probably they had the right to demand that the District act within a reasonable time, but we rule as a matter of law that under the indemnity agreement ten days' delay was not unreasonable." (Emphasis added)

Appellants quite easily could have prevented the accident to the Boorsteins by applying a temporary asphalt patch over the filled excavation which in turn would have prevented the washout. But the District chose to perform this task itself and specifically reserved to itself the right to resurface the excavation by the terms of the application.

Therefore, the decision of the Municipal Court of Appeals places appellants in the awkward predicament of having the means to prevent the accident, being unable to do so because of the reservation of the right to resurface to the District but nevertheless requiring them to indemnify the District for its failure to perform the act of resurfacing which they neither could have initiated nor controlled— indeed, a most vexing plight.

CONCLUSION

The construction placed by the Municipal Court of Appeals on the indemnifying language of the standard form of application and permit of the District of Columbia for excavation in a public street is both contrary to public policy and a violation of the well-entrenched rule that indemnity agreements will be strictly construed, especially when the effect would be to give indemnity against one's own negligence. The decision of the Municipal Court of Appeals therefore is manifestly unjust and clearly erroneous.

By reason of all of which it is respectfully submitted that the judgment of the Municipal Court of Appeals for the District of Columbia should be reversed and that the judgment of the Municipal Court for the District of Columbia for defendants, appellants herein, should be affirmed.

Respectfully submitted,

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(i)

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JOINT APPENDIX

**IN THE MUNICIPAL COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

DISTRICT OF COLUMBIA	:
a Municipal Corporation	:
District Building	:
Washington 4, D. C.,	:
Plaintiff,	:
v.	:
GENERAL HEATING ENGINEERING	:
COMPANY, INC.	:
a Corporation	:
c/o H. Edward Chozick, Registered Agent	:
848 Warner Building	:
Washington, D. C.,	:
and	:
D'APRILE BROTHERS COMPANY	:
a Corporation	:
c/o Armand D'Aprile, Registered Agent	:
1417 Saratoga Avenue, N.E.	:
Washington, D. C.	:
and	:
ARTHUR G. BRADLEY	:
3124 - 12th Street, N.E.	:
Washington, D. C.	:
and	:
JAMES B. SMITH	:
3805 - 12th Street, N.E.	:
Washington, D. C.,	:
Defendants.	:

M
Civil Action No./21998-'59

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
July 22	Affidavit and Complaint filed.
Sep. 3	Plaintiff's opposition to motion of Defendant #2 to dismiss; filed.
Sep. 10	Defendant's Motion to Dismiss denied. Smith, J.

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
Sep. 14	Answer of Defendant #3; filed.
Sep. 18	Answer of Defendant D'Aprile Brothers Co., a Corp. and Cross-claim; filed.
Sep. 22	Interrogation proposal to District of Columbia by Defendant Arthur G. Bradley; filed.
Oct. 6	Answer of Defendant General Heating Engineering Co., Inc. to Cross-claim of Defendants D'Aprile Brothers Co.; filed.
Oct. 9	Ready for Trial Calendar. 7425 J
Oct. 27	Plaintiff's Answer to Interrogation propounded by the Defendant Arthur G. Bradley; filed.
Nov. 20	Official Transcript of Proceedings - Charge of the Court (See M21780-58); filed.
Nov. 27	Motion for Summary Judgment filed by Defendant #1.
Nov. 30	On Motions Calendar. 12/16 N.S. 11/30.
Dec. 3	Motion of Defendant Arthur G. Bradley for Summary Judgment; filed.
Dec. 9	Motion of Defendant D'Aprile Brothers Co. for Summary Judgment; filed.
Dec. 15	Plaintiff's opposition to Motion of all Defendants for Summary Judgment; filed.
Dec. 16	All three Defendants' Motion for Summary Judgment are hereby denied. J. Malloy
<u>1960</u>	
Feb. 1	Pre Trial Order filed. J. Walker.
Feb. 5	Answer of Defendant Arthur G. Bradley to Cross-claim of Defendant D'Aprile Brothers Co.; filed.
Feb. 15	Answer of Defendant General Heating Engineering Co., Inc. to Cross-claim of Defendant Arthur G. Bradley; filed.
Mar. 1	<i>Specs by def 3/2</i>
Apr. 8	<i>Specs by def Re'd 4-11</i>
Apr. 12	Jury impanelled and sworn. Trial commenced and at close of Pl's case, Deft's, General Heating Engineering Co., Inc. D'Aprile Brothers, Co., and Arthur G. Bradley Motion for Directed Jury Verdict heard and granted. Wherefore, Directed Jury Verdict Defts. (Hall reporting) J. Barlow.
Apr. 18	Judg. on Directed Jury Verdict for Defts. J. Barlow.
Apr. 28	Notice of Appeal filed by Plaintiff.

[Filed July 22, 1959]

COMPLAINT

1. The amount in controversy does not exceed \$3,000.00.
2. On June 23, 1957, Rose Boorstein and Harry Boorstein sustained personal injuries and property damage when an automobile in which they were riding was caused to fall into an excavation in the public roadway in front of 1833 Primrose Road, N.W., in the District of Columbia which roadway is under the jurisdiction of the plaintiff.
3. The said excavation was made or caused to be made by the defendants, jointly or severally, for their special use and benefit, or by their agents, employees or persons acting in privity with them or on their behalf under a permit or permits applied for by the defendants, jointly or severally, or by persons acting in privity with or on behalf of said defendants and issued by the plaintiff, District of Columbia.
4. As a condition precedent to the issuance of the aforesaid permit or permits, and in consideration thereof, defendants, any or all of them, or persons acting in privity with or on behalf of any or all of said defendants, expressly agreed in writing to the following conditions, which were incorporated in the application for such permit or permits:
 - "(1) That the performance of such work or the occupancy of such space shall be strictly in accordance with the conditions set forth herein and on both sides of the permit authorizing such work or occupancy of public space.
 - "(2) That the performance of such work or the occupancy of such space as authorized by the said permit shall be in full compliance with all applicable laws and regulations of the District of Columbia.
 - "(3) That the applicant, at the applicant's risk and expense, guarantees that the public space occupied by the applicant or required for the performance of the work

authorized by the said permit, at all times will be kept in a safe condition, and where the work aforesaid results in any excavation in any street, alley, sidewalk, or other public space, the applicant will insure that such excavation is kept in a safe condition until such street, alley, sidewalk, or other public space has been repaired or resurfaced by the District of Columbia. * * *

* * *

"(5) That the applicant will save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application. * * *"

5. Plaintiff issued the aforesaid permit or permits to defendants, any or all of them, or to persons acting in privity with or on behalf of any or all of said defendants, subject to the following express conditions stated in writing in the body of the permit or permits:

"The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify and keep indemnified the District of Columbia from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent, servant, employee or contractor of the Permittee; that the Permittee will comply with all conditions set forth herein, as well as with

the conditions set forth on the form of application submitted by or on behalf of the Permittee in connection with the issuance of this permit; and that the Permittee will perform the work authorized by this permit in accordance with the application and plan (s) filed therefor, both of which have been approved by and are on file with the District of Columbia, and in accordance with all applicable laws and regulations of the District of Columbia."

6. In July, 1958, the aforesaid Rose Boorstein and Harry Boorstein filed suit in this Court Civil Action Number M 21780-58, against General Heating Engineering Company, Inc., D'Aprile Brothers Company, and the District of Columbia, for personal injury and property damage.

7. The District of Columbia notified each of the present defendants by registered mail of the pendency of the aforesaid suit, advised that in the event a verdict and judgment were entered against the District of Columbia it would demand full exoneration from them, and asked that they either settle the matter or defend the District. Defendants, however, failed either to settle the matter or to defend the District.

8. On April 22, 1959, the Judge presiding over the trial of the said Civil Action, directed a verdict for the defendants General Heating Engineering Company and D'Aprile Brothers Company with respect to plaintiffs' claims against them. Plaintiffs' suit against the District of Columbia was submitted to a jury which returned a verdict in favor of the plaintiff Harry Boorstein in the amount of \$1,500.00 and for Rose Boorstein in the amount of \$1,000.00.

9. On April 28, 1959, judgment was entered against the District of Columbia on the said verdict in the aforesaid amounts, with interest at 4 per cent from that date, together with costs amounting to \$14.00.

10. The defendant, and present plaintiff, District of Columbia, notified each of the present defendants by certified mail that the aforesaid judgment had been entered against it and demanded that they satisfy the judgment. Defendants, however, have failed and refused to satisfy that judgment.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of \$2,514.00, together with interest at 4 per cent per annum on \$2,500.00 from the 28th day of April, 1959, and costs of this suit.

/s/ CHESTER H. GRAY
Corporation Counsel, D. C.

/s/ GEORGE C. UPDEGRAFF
Assistant Corporation Counsel, D.C.

/s/ JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ PAUL HOFFLUND
Assistant Corporation Counsel, D.C.
Attorneys for Plaintiff
District Building
Washington 4, D. C.

[Filed August 31, 1959]

ANSWER OF DEFENDANT GENERAL HEATING
ENGINEERING COMPANY, INC. TO COMPLAINT

First Defense

The complaint fails to state a claim against defendant General Heating Engineering Company, Inc. upon which relief can be granted.

Second Defense

This defendant admits the allegations of paragraphs 1 and 2; admits that an excavation was caused to be made by it, as alleged in paragraph 3, and admits that permit for such excavation was applied for and thereafter issued by plaintiff; admits that the conditions as set forth in paragraph 4 were incorporated in the application for such permit or permits and agreement thereto was a condition precedent to its issuance, but denies that there was any consideration therefor; admits that the condition as set forth in paragraph 5 was written on the back of said permit or permits; admits the allegations of paragraphs 6, 7, 8, 9 and 10, as they pertain to it; and denies each and every other allegation in the complaint not hereinbefore specifically answered.

Third Defense

The judgments in favor of plaintiffs in Civil Action No. M 21780-58 were predicated upon the negligence of plaintiff (then defendant) The District of Columbia in failing to resurface or repave the filled excavation in the roadway within a reasonable length of time after notice to it by this defendant and not upon any act or omission constituting negligence on the part of this defendant.

Fourth Defense

The issue of this defendant's negligence was raised and litigated by plaintiff herein in Civil Action No. M 21780-58 and therefore the judgment thereon is conclusive in this action under the doctrine of collateral estoppel.

Fifth Defense

The alleged indemnification provisions in the application and permits heretofore referred to are conflicting and uncertain and therefore unenforceable.

PLEDGER, EDGERTON & RICHARDSON

By: /s/ John F. Mahoney, Jr.
925 Washington Building
Washington 5, D. C.
Attorneys for Defendant General
Heating Engineering Co., Inc.

Defendant General Heating Engineering Company, Inc. demands
trial by jury on all issues raised herein.

/s/ John F. Mahoney, Jr.

[Filed September 14, 1959]

ANSWER OF DEFENDANT ARTHUR G. BRADLEY

First Defense

The complaint fails to state a cause of action upon which relief can be granted.

Second Defense

He admits that on June 23, 1957, Rose and Harry Boorstein sustained injuries as a result of driving into an excavation in the roadway in front of 1833 Primrose Road, N.W.; he admits that he was issued a permit by the District of Columbia for the purpose of installing certain plumbing under the public highway and making an excavation therein; he denies that he guaranteed that the roadway would be kept in a safe condition after the excavation was completed and notice given to the District of Columbia Government of such fact. As a further defense, he asserts that the permit in question only required him to keep the excavation in a safe condition so as not to injure members of the public, but that said permit did not require him to guarantee the safety of the public for an indefinite length of time or until such time as the District of Columbia got around to resurfacing the highway; he denies that the application for the permit required him to indemnify the District of Columbia Government in any manner after he gave notice to the District of Columbia that the excavation in the street had been filled; he admits that the said Boorsteins obtained a judgment against the District of Columbia Government on April 28, 1959; he admits receiving notice from the District of Columbia Government by Registered Mail of the pendency of the suit by the said Boorsteins wherein the plaintiff demanded exoneration; each and every ^[other] allegation contained in the complaint is denied.

Third Defense

This defendant avers that the plaintiff was negligent in not resurfacing the street in question after having received due notice that the excavation was completed and backfilled. Therefore, said negligence precludes plaintiff from bringing this action.

GALIER & STEWART

By: /s/ William J. Donnelly, Jr.
Attorneys for Defendant
Arthur G. Bradley
820 Woodward Building
Washington 5, D. C.

[Filed September 18, 1959]

ANSWER OF DEFENDANT D'APRILE BROTHERS
COMPANY, A CORPORATION

Comes now the defendant, D'Aprile Brothers Company, a corporation, by and through its attorneys and for an answer to the complaint filed herein against it state:

First Defense

The complaint fails to state a cause of action upon which relief may be granted against this defendant.

Second Defense

This defendant admits the allegations of paragraphs #1 and #2 of the complaint; denies that it applied for or was granted a permit to excavate at the place referred to in the complaint; asserts that application for permit to excavate was made by and granted to the General Heating Engineering Company, Inc.; and that application was made and granted to Smith and Bradley for a plumbing and gas fitting permit; this defendant asserts that the work referred to with respect to the excavation and plumbing and gas fitting, etc., was in charge of and under the control of General Heating Engineering Company, one of the named defendants herein; this defendant further asserts that they have no obligation to this plaintiff in the premises; admits the allegations of paragraphs #6, #7, #8, #9, and #10 of the complaint as far as they pertain to it; and denies each and every other allegation of the complaint not specifically answered or denied.

Third Defense

The judgments in favor of plaintiffs in Civil Action No. M-21780-58 were predicated upon the negligence of the plaintiff District of Columbia, a Municipal Corporation, the defendant in that action, in failing to re-surface and repave the excavated portion of the roadway within a reasonable length of time after notice was given to it by the defendant General Heating Engineering Company, Inc.

Fourth Defense

The issues in this case, namely the negligence of this defendant were raised and litigated in the earlier action, #M-21780-58 and under

the doctrine of collateral estoppel the judgment of the Court is conclusive as to the issues raised in the subsequent action.

Fifth Defense

The indemnification provisions in the application and permit referred to by the plaintiff in the complaint have no bearing or effect upon this defendant as it did not apply, nor was it granted a permit and therefore would not be bound by any provisions of the said application for permit.

Cross-Claim

This defendant asserts that if the plaintiff has any right of action under the application or permit to excavate the paved public space, it would be on the basis of the General Heating Engineering Company and/or its agents or employees, Arthur G. Bradley and James B. Smith applying for and receiving a permit to excavate the paved public space and should any judgment be obtained by the plaintiff against this defendant, this defendant prays judgment by way of indemnity and/or by way of contribution against the General Heating Engineering Company, Inc., and/or its agents employees, Smith and Bradley.

WELCH, DAILY & WELCH

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D'Aprile Brothers Co.
505 Investment Building
Washington, D. C.

[Filed October 6, 1959]

ANSWER OF DEFENDANT GENERAL HEATING ENGINEERING COMPANY, INC. TO CROSS-CLAIM OF DEFENDANT D'APRILE BROTHERS COMPANY

First Defense

The cross-claim fails to state a claim against defendant General Heating Engineering Company, Inc. upon which relief can be granted.

Second Defense

This defendant denies that it was negligent and, therefore, denies that defendant D'Aprile Brothers is entitled to the relief sought.

* * * *

[Filed February 1, 1960]

PRE-TRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

The District of Columbia seeks \$2500 from the defendants in indemnification of a like amount which it was compelled to pay Boorstein and his wife Rose Boorstein as a result of a jury verdict in Civil Action No. M21780-58. The Boorsteins were injured as a result of their automobile falling into an excavation in the public roadway in front of 1833 Primrose Rd., N.W. The excavation was authorized by a permit issued by the District of Columbia and it is alleged that both the application and the permit show that D'Aprile Bros. Co., Inc. was the owner of the premises in connection with which the work was being done, that the application and permit were applied for by the then partnership of Smith & Bradley, licensed master plumbers and that the application was filed and the permit obtained by or on behalf of General Heating Engineering Co., Inc. It is alleged that both in the application and as a condition for the issuance of the permit, the defendants collectively agreed to indemnify the District for all personal injuries and property damage for which the District might be held liable because of the condition of the roadway resulting from the work done pursuant to the permit.

In the prior action General Heating and D'Aprile Bros. were co-defendants with the District of Columbia. At the conclusion of all of the evidence the trial court directed a verdict in favor of General Heating and D'Aprile Bros. leaving the District as the sole defendant. Bradley and Smith were not parties to that action.

The defendants all contend that the verdict of the jury against the District of Columbia necessarily resulted from a finding by the jury that

the District of Columbia was negligent and that therefore is precluded from recovering under the terms of the application and permit. They also contend that under the court's instructions in the prior case, the jury found that the District of Columbia failed to resurface the roadway within reasonable time after notification that the work had been completed. Thus, they say, that the District is a tortfeasor which cannot recover under the indemnification agreement.

Defendants General Heating and D'Aprile also say that their negligence was raised and resolved in their favor. They also say that the verdict in the prior case was a general one from which no deduction may be made that the District was held liable because of any negligent acts or omissions of them, under the theory of Dist. of Columbia v. Hickey, 150 A.2d 463. They also contend that the application and permits were conflicting and uncertain and if the same were to be held to absolve the District from liability for its own negligent acts, the provisions of the application and permits are unenforceable as being against public policy.

D'Aprile Bros. contends that it neither applied for nor was issued any permit and therefore it is not bound by any provisions in the applications or permit and contends further that General Heating was an independent contractor and all the work was done by them or subcontracted and it, D'Aprile, is not liable for any act or acts of General Heating or its subcontractors or agents.

D'Aprile crossclaims against each co-defendants for indemnification and Smith and Bradley are given leave to file a cross-claim against General Heating for indemnification.

ORDERS AND STIPULATIONS:

The contract between D'Aprile and General may be received in evidence without formal proof, subject to objections for relevancy.

Number of witnesses - 14

Time of trial - 4

Possibility of settlement - poor

Dated: February 1, 1960

/s/ Harry L. Walker
Pre-Trial Judge

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[Filed February 5, 1960]

**CROSS-CLAIM OF DEFENDANT ARTHUR G. BRADLEY
AGAINST GENERAL HEATING ENGINEERING CO., INC.**

The defendant Arthur G. Bradley cross claims against General Heating Engineering Co., Inc., averring that if the District of Columbia is entitled to indemnification under the terms of the work permits sued upon, then Arthur G. Bradley is in turn entitled to indemnification or contribution for all or part of any judgment that may be awarded against him, on the ground that defendant Bradley was acting as agent for General Heating Engineering Co., Inc. for the purpose of obtaining the permits in question and as a plumber had no part in the excavation in question and back-fill thereof which were done by General Heating Engineering Co., Inc.

GALIHER & STEWART

By: /s/ William J. Donnelly, Jr.
Attorneys for Defendant Bradley

* * *

[Certificate of Service]

[Filed February 15, 1960]

**ANSWER OF DEFENDANT GENERAL HEATING
ENGINEERING COMPANY, INC. TO CROSS-
CLAIM OF DEFENDANT ARTHUR G. BRADLEY**

First Defense

The cross-claim fails to state a claim against defendant General Heating Engineering Company, Inc. upon which relief can be granted.

Second Defense

This defendant denies that it was negligent in any respect and therefore denies that Defendant Arthur G. Bradley is entitled to the relief sought.

PLEDGER, EDGERTON & RICHARDSON

By: /s/ John F. Mahoney, Jr.

* * *

Attorneys for Defendant General
Heating Engineering Company, Inc.

[Certificate of Service]

[Received May 4, 1960]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.,
Tuesday, April 12, 1960

* * * * *

13

JOHN A. SPIESS

was called as a witness for and on behalf of the plaintiff, District of Columbia, and, first having been duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EARNEST:

* * * * *

Q. In connection with your duties that you perform, are you familiar with records of the Department? A. Yes, sir. As part of my duties I have the custody of the, sir, records in the Record Division of Licenses and Permits.

* * * * *

17

[Whereupon, the document heretofore identified by the witness, entitled "Application for an excavation permit-water" dated June 10, 1957, was received in evidence as Plaintiff's Exhibit No. 1.]

* * * * *

[Whereupon, the document heretofore referred to entitled "Application for an excavation permit-sewer" dated June 10, 1957, was received in evidence as Plaintiff's Exhibit No. 2.]

* * * * *

18

[Whereupon, the "Public space permit" dated June 10, 1957, was received in evidence as Plaintiff's Exhibit No. 3.]

* * * * *

31

MR. EARNEST: At this time, if the Court please, I will move the Court to introduce this document in evidence as Plaintiff's Exhibit No. -- next number.

THE COURT: No. 4.

MR. EARNEST: This document is entitled "Application for a building permit," I might note for the record. It is dated February 15, 1957.

I would ask that, since these other documents which have just been discussed with the witness, are a part of the application, which would be Plaintiff's Exhibit No. 4, and are supporting documents to this application for a permit entitled, "Application for a terrace or parking" -- and so forth, -- and I hand this up to your Honor -- the application for permission to grade 1833 Primrose Road, Northwest be given a subletter thereunder so that the permit for the roadway and sidewalk work be identified or be admitted into evidence as Plaintiff's Exhibit No. 4-A.

THE COURT: I think it would be better to mark the application as Plaintiff's Exhibit No. 4-A, and to mark the latter one as Plaintiff's Exhibit No. 4-B so that we can keep them more readily identified.

* * * * *

33 [Whereupon, the "Application for building permit heretofore referred to was marked as Plaintiff's Exhibit No. 4-A and received in evidence.]

THE COURT: The "Application for Terrace or Parking" will be marked as Plaintiff's Exhibit No. 4-B and received in evidence. [Whereupon, the "Application for Terrace or Parking" under date of February 15, 1957, was marked Plaintiff's Exhibit No. 4-B and received in evidence.]

THE COURT: Let me have the third one.

MR. EARNEST: I am offering this document entitled "To be attached to building application" as Plaintiff's Exhibit No. 4-C.

THE COURT: It will be admitted. [Whereupon, the document entitled "To be attached to building application" dated February 18, 1957, re premises 1833 Primrose Road Northwest was marked Plaintiff's Exhibit No. 4-C and received in evidence.]

34 MR. EARNEST: I offer document entitled "Affidavit of Ownership" as Plaintiff's Exhibit No. 4-D.

THE COURT: It will be admitted. [Whereupon, the document entitled "Affidavit of Ownership" signed by Oliver D'Aprile under date of 8 of February, 1957, was received in evidence as Plaintiff's Exhibit No. 4-D.

* * * * *

38 [Whereupon, the document entitled "Form 651-CPB Building Permit No. B-1014 was marked for identification as Plaintiff's Exhibit No. 5.]

* * * * *

44 THE COURT: All right. I will let that into evidence on the issue of ownership.

* * * * *

[Whereupon, Plaintiff's Exhibits No.'s 4 and 5 for identification were received in evidence.]

* * * * *

45 Whereupon,

OLIVER D'APRILE

was called as a witness for and on behalf of the plaintiff, under the rule, and, first having been duly sworn by the deputy clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EARNEST.

* * * * *

46 Q. And what is the name of your company? A. D'Aprile Brothers Company.

Q. And is that a corporation? A. It is.

47 Q. And what position do you occupy in that corporation, Mr. D'Aprile? A. I am president of the corporation.

* * * * *

48 Q. And with respect to premises 1833 Primrose Road Northwest in 1957, June, to be specific, 1957, did you own the property? A. Not personally.

Q. Did the corporation own the property? A. The corporation, yes.

Q. The corporation had to act through you and the other officers, is that not true, Mr. D'Aprile? A. Yes.

49 Q. So, in 1957 D'Aprile Brothers Construction Company were, in fact, the owners of 1833 Primrose Road Northwest, is that right? A. Yes, sir.

* * * * *

61

MILTON L. YINGLING

was called as a witness for and on behalf of the plaintiff, under the rule, and, first having been duly sworn by the deputy clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EARNEST:

* * * * *

62

Q. And what is the name of your company, sir? A. General Heating Engineering Company, Incorporated.

Q. What position do you occupy in that corporation A. President.

* * * * *

63

Q. Will you tell us what work was performed by your company in connection with those premises? A. We had the complete job of doing the plumbing in the building, and bringing the sewer and bringing the water in from the trunk lines in the street.

* * * * *

Q. In connection with the work that you did, now, Mr. Yingling, it would be necessary for you to procure certain permits from the District of Columbia Government, would it not? A. Yes, sir.

Q. Among those, Mr. Yingling, did you obtain a permit to excavate in public space? A. Yes, sir.

Q. And to tie in the water and sewer services, is that not correct? A. Yes, sir.

* * * * *

64

Q. On the occasion that you went to the District Building to get that permit you had with you a licensed master plumber that signed with you? A. Yes, sir.

Q. Will you tell us who he was or who he is? A. Mr. Bradley.

* * * * *

65

Q. And so that the application for a permit was signed by him, is that correct? A. Yes, sir.

Q. All right, sir. A. Yes.

Q. At the time that you made the application, did Mr. D'Aprile or did the D'Aprile Construction Company know that you were going to make application for those permits? A. Yes, sir.

Q. Were you authorized, orally or in writing, to use the name of the D'Aprile Construction Company in connection with any permits which you had to obtain? A. Yes, sir.

* * * * *

66 Q. In other words, Mr. Bradley signed that on your behalf and on behalf of the D'Aprile Construction Company? A. That is right.

* * * * *

69 Q. All right, sir. Following the issuance of this permit was public space excavated at 1833 Primrose Road Northwest? A. Yes, sir.

Q. And did you, or persons in your employ, and acting on your behalf, do that work? A. Yes, sir.

Q. And did the time come when you did complete that work or had completed that work as far as connecting up with the water and sewer service, and you back-filled the excavation? A. Yes, sir.

Q. Was that done by people in your employ? A. It was.

* * * * *

75 ARTHUR GARFIELD BRADLEY, JR.

was called as a witness for and on behalf of the plaintiff, under the rule, and, first having been duly sworn by the deputy clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EARNEST:

* * * * *

76 Q. In June of 1957 did you apply for a certain plumbing permit with respect to work to be performed at 1833 Primrose Road Northwest, Washington, D. C.? A. Yes, sir.

* * * * *

77 Q. And you are the same Mr. Arthur G. Bradley, Jr. that went with Mr. Yingling at the time he made application for these permits, that application for these permits were made, are you not, sir?
A. I am.

Q. And those applications were made over your signature, I believe? A. That is right.

Q. And ultimately a permit authorizing the excavation in public space for the premises in question; namely, 1833 Primrose Road, Northwest, was issued? A. Yes, sir.

* * * * *

80 Q. And you actually filled out the name of D'Aprile Brothers and Company on the application? A. Yes, sir.

* * * * *

Q. But you and Mr. Yingling -- but Mr. Yingling and you had an agreement whereby you would do this act as master plumber for General Heating Engineering Company, at least, for the purpose of getting these permits? Is that right, sir? A. That is right.

* * * * *

85 MR. MAHONEY: May it please the Court, on behalf of the General Heating Engineering Company, Incorporated, we move for a directed verdict at this time for the reason that plaintiff has failed to make out a prima facie case of negligence against this defendant, in fact, has not made out a prima facie case of negligence against any of the defendants which would constitute a case under which an indemnity action could be successfully maintained. First of all, a municipality which has been held liable for injuries or damages caused by a dangerous condition cannot recover over unless it is shown that the obstruction which caused the condition is due to the primary responsibility or the negligence of someone against, or rather, the negligence, someone's negligence against whom

86 a claim of indemnity is made. I should like to argue that motion, now, if I may.

THE COURT: Proceed. [Whereupon, the motion was argued to the Court by Mr. Mahoney.]

* * * * *

MOTION FOR A DIRECTED VERDICT ON BEHALF OF THE
DEFENDANT ARTHUR G. BRADLEY

MR. DONNELLY: If your Honor please, I now make the motion for a directed verdict in favor of the defendant Arthur G. Bradley. In doing

so, I adopt completely everything that Mr. Mahoney has said on behalf of the defendant General Heating Engineering Company; that is, everything that he said in his argument because, as it set forth in his answer to the complaint, and as set forth in his argument to the Court, therefore, we adopt in its entirety the argument that has been made on behalf of General Heating Engineering Company, and I should like to again emphasize what Mr. Mahoney said about this statement as contained in

87 the application for and the permit, because the permit itself clearly spells out the permit and the application, which must be read as a part of the permit itself, and that the two go together, they cannot be separated.

After all, the application and the permit are prepared by and designed to protect the plaintiff in this case, and since it is the District Government who has prepared this document, they are the ones -- I should say these two documents; that is, the application and the permit -- they are the ones that drew it up, both of them, and it should be construed against them if there is any ambiguity in the thing, and I point out that the permit specifically says that the District Government is the one person that should back-fill this ditch, no one else could do so, the District Government is the only one to do it. That is my motion, and with your Honor's permission I should like to argue it briefly.

THE COURT: You may do so. [Whereupon, Mr. Donnelly argued his motion to the Court.]

* * * * *

88 **MOTION FOR A DIRECTED VERDICT ON BEHALF OF
D'APRILE BROTHERS**

MR. BUTLER: On behalf of D'Aprile Brothers Company I wish to move for a directed verdict in its behalf at this time. I would like to incorporate both the authorities I cited in my previous arguments and all of the authorities cited by both Mr. Mahoney and Mr. Donnelly in support of their motions. I feel that the subject has been covered so thoroughly previously that I do not want to belabor the point. That, therefore, is my motion. I should like to say just a few words in argument on the matter.

THE COURT: Very well. [Whereupon, Mr. Butler argued his motion to the Court.]

* * * * *

89

OPINION AND RULING OF THE COURT

THE COURT: It seems to me that this application and permit would have had to be construed in the prior case. It further appears that what Judge Burnett stated to the jury, along with his directed verdict in favor of the two defendants, and the fact that he put before them the question of reasonable time for resurfacing the road; and the fact that the permit allows the District of Columbia alone to resurface the street, is pretty much conclusive.

I do not see anything here to submit to the jury. I do not think it can be decided as a matter of law that the defendants are liable. So, I will grant the motions for a directed verdict. Will you have the jury come in, please. [Whereupon, the jury entered the Courtroom and was seated in the jury box.]

THE COURT: Members of the jury, I am going to rule as a matter of law that in this case there is no question to submit to the jury. I am going to direct a verdict in favor of the three defendants named in this case; that is, General Heating Engineering Company, Incorporated, d'Aprile Brothers Company, and Arthur G. Bradley. It appears to the Court that in the former case the manner in which it was submitted to the jury, under the rules of law which were applicable in the former case, are conclusive of the lack of liability of the present three defendants. So, your verdict, therefore, will be directed in favor of the three defendants I have just mentioned.

* * * * *

90

PLAINTIFF'S EXHIBIT NO. 1

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 DEPARTMENT OF LICENSES AND INSPECTIONS
 LICENSE AND PERMIT DIVISION
 CENTRAL PERMIT SECTION

Form 207 CPB
 5-1-53

Lot 24
 Square N2755

Permit No. AB8627
 Permit Fee \$ 6.00

APPLICATION FOR AN EXCAVATION PERMIT - WATER

Washington, D. C., June 10, 1957

APPLICATION IS HEREBY MADE FOR PERMISSION TO MAKE
 EXCAVATION IN roadway (x) ~~sidewalk~~ (x) ~~parking~~ (x) ~~area~~ ~~near~~
~~water~~ FOR THE PURPOSE OF connecting with water main ~~near~~
~~water service pipe~~ ~~at~~ ~~premises~~ ~~at~~ ~~grade~~ at premises No.
 1833 Primrose Rd. N.W.

CONDITIONS OF APPLICATION AND PERMIT

As a condition precedent to the issuance of such permit, and in consideration thereof, the permittee expressly agrees to the following conditions which are incorporated in the application for such permit:

(1) That the performance of such work or the occupancy of such space shall be strictly in accordance with the conditions set forth herein and on both sides of the permit authorizing such work or occupancy of public space.

(2) That the performance of such work or the occupancy of such space as authorized by the said permit shall be in full compliance with all applicable laws and regulations of the District of Columbia.

(3) That the applicant, at the applicant's risk and expense, guarantees that the public space occupied by the applicant or required for the performance of the work authorized by the said permit, at all times will be kept in a safe condition, and where the work aforesaid results in any excavation in any street, alley, sidewalk, or other public space, the applicant will insure that such excavation is kept in a safe condition until such street, alley, sidewalk, or other public space has

been repaired or resurfaced by the District of Columbia. The repair or resurfacing of the street, alley, sidewalk or other public space made necessary by the excavation, will be performed by the District of Columbia at the expense of the applicant.

(4) That the applicant guarantees that if, in the opinion of the Director of Highways or his representative, any work performed in, or occupancy of, public space by him or on his behalf, in any manner becomes dangerous to, or interferes unnecessarily with, pedestrian or vehicular traffic, the applicant will take such action as, in the opinion of the said Director or his representative is necessary to remove such dangerous condition or unnecessary interference with traffic.

(Read additional Conditions on reverse side)

I HAVE READ AND UNDERSTAND THE CONDITIONS SET FORTH ON THIS APPLICATION, AND I FURTHER UNDERSTAND THAT PENALTIES ARE PROVIDED FOR FURNISHING FALSE INFORMATION.

(printed) Oliver D'Aprile

Smith & Bradley

~~ID Apple Bros. Co.~~

/s/ Arthur G. Bradley, Jr.

Approved for Plumbing

APPROVED

Date Jun 10, 1957

Jun 10, 1957

/s/

Department Highways

(initialed)

Approved Jun 6, 1957

Water Registrar

(Initialed)

[reverse side]

(5) That the applicant will save harmless, indemnify, and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application.

(6) That the applicant agrees that the backfilling of any excavation made by him or on his behalf will be performed in the manner prescribed below and should any settlement or sinking resulting from backfilling occur within two (2) years after the District of Columbia, at the applicant's expense, has repaired or resurfaced the surface of the public space in which the excavation was made, the applicant nevertheless will save harmless, indemnify and keep indemnified the District of Columbia from any injury, loss, cost, or damage occasioned by a physical change in such repaired or resurfaced public space.

Should repairs become necessary over said excavation during the aforementioned period due to settlement of said excavation occasioned by improper excavation work or backfilling, the necessary re-excavation and repair shall be done by the District of Columbia and the cost thereof shall be charged to the applicant.

(7) That the applicant agrees that all portions of the street excavated will be put in as good condition as before the excavation was made and that such excavation will be backfilled within twenty-four (24) hours after approval by the District (if required) of the construction, connections or repairs installed or made therein, such backfilling not to extend more than two inches (2") above the adjoining pavement or surface and to be thoroughly compacted in such manner as to avoid any sinking or settlement either of the backfill or of any pavement laid thereon for a period of two (2) years after the area over such excavation has been repaired or resurfaced by the District.

(8) That the applicant agrees that:

(a) No cut will be made in a roadway or alley unless material to complete the job is on hand or immediately available, that work will be carried to completion in the shortest possible time, and that there will be no interference with traffic unless such interference is specifically authorized by the Director of Highways, or his representative.

(b) A clear safe pedestrian passageway not less than 3 feet wide, in line with any existing sidewalk, will be provided at all times unless otherwise authorized by the Director of Highways, or his representative.

(c) He will not cut or injure trees, or pile earth or other material within 3 feet of trees unless such trees are properly protected in a manner approved by the Director of Highways, or his representative.

(d) No existing underground construction will be interfered with.

(e) All pipes and conduits except as otherwise specified in Section 509 of D. C. Plumbing Code, will be laid not less than 30 inches below any roadway, not less than 24 inches below grade on other public space, except that street light conduits may be laid not less than 18 inches below any approved grade, unless otherwise authorized.

(f) Surface (lawns, grass, shrubs, etc.) will be restored upon completion of work.

(g) All material, equipment, surplus excavated material, debris, etc., will be removed from public space as soon as possible, consistent with working hours and conditions, within the three working days following the completion of the work authorized by the permit.

(9) That the applicant agrees that covers placed on manholes be of an approved pattern.

REPORT OF INSPECTOR

3/4 Copper inch service from main to Bldg. Location of stopcock 2' Inside Curb 36' W of E lot line.

I certify that this work was performed in accordance with the Plumbing Code, and was inspected and passed by me, the Inspector whose signature is hereto affixed, this date 6-13, 1957.

/s/

(Assistant Inspector of Plumbing)

Noted and returned to the Central Permit Bureau
for file Jun 17 1957 .

/s/ Henry J. Sawaha

(Inspector of Plumbing)

PLAINTIFF'S EXHIBIT NO. 2

Form 206 CPB
5-1-53

Lot 24

Square N 2755

Permit No. B8627

Permit Fee \$ 6.00

APPLICATION FOR AN EXCAVATION PERMIT - SEWER

Washington, D. C., June 10, 1957

APPLICATION IS HEREBY MADE FOR PERMISSION TO MAKE
EXCAVATION IN roadway (x) ~~sidewalk~~ (x) ~~alley~~ (x) ~~other public space~~
~~for the purpose of connecting with main sewer~~
~~existing and cleaning sewer~~ ~~existing sewer~~ at premises
No. 1833 Primrose Rd. N.W.

CONDITIONS OF APPLICATION AND PERMIT

As a condition precedent to the issuance of such permit, and in consideration thereof, the permittee expressly agrees to the following conditions which are incorporated in the application for such permit:

(1) That the performance of such work or the occupancy of such space shall be strictly in accordance with the conditions set forth herein and on both sides of the permit authorizing such work or occupancy of public space.

(2) That the performance of such work or the occupancy of such space as authorized by the said permit shall be in full compliance with all applicable laws and regulations of the District of Columbia.

(3) That the applicant, at the applicant's risk and expense, guarantees that the public space occupied by the applicant or required for the performance of the work authorized by the said permit, at all times will be kept in a safe condition, and where the work aforesaid results in any excavation in any street, alley, sidewalk, or other public space, the applicant will insure that such excavation is kept in a safe condition until such street, alley, sidewalk, or other public space has been repaired or resurfaced by the District of Columbia. The repair or resurfacing of the street, alley, sidewalk or other public space made necessary by the excavation, will be performed by the District of Columbia at the expense of the applicant.

(4) That the applicant guarantees that if, in the opinion of the Director of Highways or his representative, any work performed in, or occupancy of, public space by him or on his behalf, in any manner becomes dangerous to, or interferes unnecessarily with, pedestrian or vehicular traffic, the applicant will take such action as, in the opinion of the said Director or his representative is necessary to remove such dangerous condition or unnecessary interference with traffic.

(Read additional Conditions on reverse side)

I HAVE READ AND UNDERSTAND THE CONDITIONS SET FORTH ON THIS APPLICATION, AND I FURTHER UNDERSTAND THAT PENALTIES ARE PROVIDED FOR FURNISHING FALSE INFORMATION.

(printed) Oliver D'Aprile

Smith & Bradley

~~TOP SECRET//SI//NF~~

/s/ Arthur G. Bradley, Jr.

Approved for Plumbing

Date Jun 10, 1957

/s/

APPROVED - Jun 10, 1957

Department Highways

(initialed)

Approved - Jun

Water Registrar

(initialed)

[reverse side]

(5) That the applicant will save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application.

(6) That the applicant agrees that the backfilling of any excavation made by him or on his behalf will be performed in the manner prescribed below and should any settlement or sinking resulting from backfilling occur within two (2) years after the District of Columbia, at the applicant's expense, has repaired or resurfaced the surface of the public space in which the excavation was made, the applicant nevertheless will save

harmless, indemnify and keep indemnified the District of Columbia from any injury, loss, cost, or damage occasioned by a physical change in such repaired or resurfaced public space.

Should repairs become necessary over said excavation during the aforementioned period due to settlement of said excavation occasioned by improper excavation work or backfilling, the necessary re-excavation and repair shall be done by the District of Columbia and the cost thereof shall be charged to the applicant.

(7) That the applicant agrees that all portions of the street excavated will be put in as good condition as before the excavation was made and that such excavation will be backfilled within twenty-four (24) hours after approval by the District (if required) of the construction, connections or repairs installed or made therein, such backfilling not to extend more than two inches (2") above the adjoining pavement or surface and to be thoroughly compacted in such manner as to avoid any sinking or settlement either of the backfill or of any pavement laid thereon for a period of two (2) years after the area over such excavation has been repaired or resurfaced by the District.

(8) That the applicant agrees that:

(a) No cut will be made in a roadway or alley unless material to complete the job is on hand or immediately available, that work will be carried to completion in the shortest possible time, and that there will be no interference with traffic unless such interference is specifically authorized by the Director of Highways, or his representative.

(b) A clear safe pedestrian passageway not less than 3 feet wide, in line with any existing sidewalk, will be provided at all times unless otherwise authorized by the Director of Highways, or his representative.

(c) He will not cut or injure trees, or pile earth or other material within 3 feet of trees unless such trees are properly protected in a manner approved by the Director of Highways, or his representative.

(d) No existing underground construction will be interfered with.

(e) All pipes and conduits except as otherwise specified in Section 509 of D. C. Plumbing Code, will be laid not less than 30 inches below any roadway, not less than 24 inches below grade on other public

space, except that street light conduits may be laid not less than 18 inches below any approved grade, unless otherwise authorized.

(f) Surface (lawns, grass, shrubs, etc.) will be restored upon completion of work.

(g) All material, equipment, surplus excavated material, debris, etc., will be removed from public space as soon as possible, consistent with working hours and conditions, within the three working days following the completion of the work authorized by the permit.

(9) That the applicant agrees that covers placed on manholes be of an approved pattern.

REPORT OF INSPECTOR

1. The connection has been made by Standard "Y" thimble (Y-Branch) saddle. 4" C. I.
2. The tap in terra cotta sewer has been inspected by me and is properly made and is correct in size and shape.
3. The tap and connection have been inspected before same was cemented.
4. The "Y" thimble is set correctly to the flow in the sewer.
5. The connection is located on No side of Primrose street, 33' feet from W of E lot line.
6. The conditions of the permit have been complied with and the work has been properly done.

6-12, 1957

/s/

(Assistant Inspector of Plumbing)

Noted and returned to the Central Permit Bureau for file. _____, 19__.

(Inspector of Plumbing)

PLAINTIFF'S EXHIBIT NO. 3

Form 702-CPB PUBLIC SPACE PERMIT - COPY U. C. No.
 Date 6/10/57 (Type) WATER & SEWER Permit No. B 8627
 Address of work: 1833 Primrose Rd. N.W. Lot 24 Square N2755
 Permit Fee \$ 12.00

Permission is hereby granted to: Smith & Bradley

Oliver D'Aprile to perform the work described herein at the address shown above in strict accordance with the conditions stated on BOTH sides of this permit.

CONNECTING WITH WATER MAIN & MAIN SEWER IN THE ROADWAY
 SIDEWALK & PARKING

This Permit Expires: 6/20/57

CHIEF, PERMIT BRANCH
 Superintendent of Permits (stamp)

By: ELAINE L. MARTIN
 Permit Clerk

[reverse side]

**INDEMNIFICATION AGREEMENT AND CONDITIONS PERTAINING
 TO THE PERFORMANCE OF WORK AUTHORIZED BY THIS PERMIT:**

The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify and keep indemnified the District of Columbia from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent, servant, employee or contractor of the Permittee; that the Permittee will comply with all conditions set forth herein, as well as with the conditions set forth on the form of application submitted by or on behalf of the Permittee in connection with the issuance of this permit; and that the Permittee will perform the work authorized by this permit in accordance with the application and plan(s) filed therefor, both of which have been approved by and are on file with the District of Columbia, and in accordance with all applicable laws and regulations of the District of Columbia.

NOTE: THIS PERMIT MUST BE KEPT AT THE ADDRESS OF THE WORK

AND IN THE CUSTODY OF THE PERSON WHO IS DIRECTLY IN CHARGE OF AND RESPONSIBLE FOR SUCH WORK, UNTIL THE WORK IS COMPLETED; & SHALL BE EXHIBITED TO THE POLICE OR OTHER PERSONS HAVING AUTHORITY TO EXAMINE IT. DO NOT CUT OR INJURE SHADE TREES, OR PILE EARTH OR OTHER MATERIAL WITHIN THREE (3) FEET OF TREES. THIS PERMIT IS REVOCABLE AT ANY TIME AT THE DISCRETION OF THE COMMISSIONERS, D. C.

PLAINTIFF'S EXHIBIT NO. 4-A

LC-5

Form 151 CPB (stamp) SEWER AVAILABLE
Rev. 1-26-56

(stamp)
See Driveway Approval for Deposit.
(initialed E.L.B.)

[Permit No. B21014 Issued 3/11/57]

(date) Feb. 15, 1957

APPLICATION FOR BUILDING PERMIT (stamp) CURB GRADE
(New Building or Additions to an existing bldg.) APPLIED FOR

(stamp)
NO WATER
AVAILABLE

FILE REPAIR APPLICATION ALSO if any Repairs or Alterations to existing Building are proposed.

Lot. No. 24

Address of proposed work 1833 Primrose Rd., N.W. Sq. No. N2755

Name of owner D'Aprile Bros. Co. Address 1417 Saratoga Av N.E.

All use(s) of Building Dwelling. Material of building brick, stone, concrete, wood, cinder blk.

No. of Stories under Zoning Reg. 3 Cost of Construction \$ 20,000

No. of stories for purpose of exits and fireproofing 1. No. of Bldgs. 1

Total No. of rooms in Bldg. 6 No. of dwelling units 1 No. of bricks 29,000. Concrete 36 (Cu. yds.) Cubic contents of proposed work 27,554. Name of builder D'Aprile Bros. Co. Address 1417 Saratoga Av.N.E. Tel. No. JU 8 3400.

Does this work require a Registered Architect or Professional Engineer? Yes. Name of ARCHITECT E. A. Ledwith Address 1807 H St. NW Tel. No. ME 8 2026 D.C. Registration No. 678

Name of Professional Engineer _____ Tel. No. _____

Address _____ D. C. Registration No. _____

Have dimensions of all buildings and yards been properly indicated on Surveyor's plat? Yes.

Will any part of the building be used for commercial purposes? No.

Will there be any projections beyond the building line? No.

*	*	*	*	*
A-612				
Size of lot: Width	<u>77.05'</u>	TO BE FILLED IN BY PERMIT CLERK		
Depth	<u>73.42' & 97.0'</u>	Use District	<u>Res</u>	
Wall bearings	<u>Yes</u>	Height District	<u>40</u>	
Skeleton	<u>No</u>	Area District	<u>AR</u>	
Soil value assumed?	<u>3 tons</u>	Name of Clerk		
Live load floor capacity?	<u>40#</u>	Date of Filing Fee	<u>2-18-57</u>	
Live load roof capacity?	<u>30#</u>	Filing Fee	<u>\$ 20.00</u>	
		Permit Fee	<u>\$ 55.00 (initialed)</u>	L.H.D.

Are there any condemnation proceedings against the building? No.

Height of building, through center line of building, from front sidewalk to highest point of roof at centerline of building 19-11 1/2. Height of terrace above sidewalk 3-0. Height of first floor above sidewalk 5-11 1/2. Has a certificate of parking been filed? Yes.

Give MATERIAL AND THICKNESS of external walls: Foundation to 1st floor Bk & C.B. 12" & 8". 1st to 2nd 4 Bk 4 C.B. 8 * * *

Give MATERIAL AND THICKNESS of party walls: Foundation to 1st floor - None. * * * *

Will the roof be pitch, mansard, or flat? Pitch. Roof covering Comp.

Shingles. Will the front wall project beyond the front walls of other bldgs. in block? No. Will building be wired for electricity? Yes.

How will bldg. be heated Gas Hot Air.

Number and type of elevators -- Have elevator plans been filed? --

Is there a sidewalk, curb or improved roadway in front of proposed building? Yes. Has curb grade been obtained from the Engineer of

Streets? Yes. Alley grades? -- Automobile parking spaces to be provided in bldg.? Yes. Outside on lot? --

The owner or his agent in affixing his signature hereto expressly agrees to comply with all specifications and conditions of this application and all Codes and Regulations of the District of Columbia.

Penalties are Provided for Misrepresentation
Read Instructions and Information on Reverse Side of this Application
Answer All Questions on Both Sides of the Application

IF OWNER EXECUTES -

Signature of owner(s) _____ Tel. _____

IF AGENT EXECUTES -

Name of authorized agent E. A. Ledwith Tel. ME 8 2026Address of authorized agent 1807 H St. NW

Execution by Agent (D'APRILE BROS. CO.
((Name of Owner)
(By /s/ E. A. Ledwith
((Signature of Authorized Agent)

TO THE DIRECTOR OF INSPECTION for the following approvals:

PLUMBING. Approved: /s/ R. Fitzgerald, Engineer. Feb. 20, 1957.

MECHANICAL and REFRIGERATION. Approved: /s/ A. Gleason, Engineer, Feb. 20, 1957.

ELECTRICAL. Approved: /s/ O. S. Kern, Engineer. Feb. 20, 1957.

SMOKE & BOILER. ---

APPROVED FOR PERMIT. /s/ L. H. Dudley, Engineer. Feb. 25, 1957.

[reverse side]

The following information on plans and applications is frequently overlooked by architects and this information should be furnished:

* * * * *

PLAINTIFF'S EXHIBIT NO. 4-B

APPLICATION FOR TERRACE OR PARKING REGULATION

Feb. 15th, 1957 [Stamp: THIS PERMIT
EXPIRES Aug. 14, 1957]

INSPECTOR OF BUILDING

Applicant D'Aprile Bros Co. Address 1417 Saratoga Av NEKnown as premises 1833 Primrose Road NW Lots 24 Square N 2755Present height of terrace or parking above curb 5.3' to 6.3'Proposed height of terrace or parking above curb 3.0'

Will any of the proposed improvements require the removal of a tree from public space? No.

Respectfully forwarded to Inspector of Buildings, D. C., reporting that the applicant is authorized to Reduce the height of the public parking at the location specified above to be 3.0'.

ALL TREES TO BE REMOVED FROM PUBLIC PARKING BY
APPLICANT.

Date Feb. 22, 1957

/s/ John W. Bataon
Sup't of Trees and Parking, D. C.

Necessary adjustments of any and all water appurtenances must be made by you.

[reverse side]

(stamp) Dept. of Sanitary Eng'rg.
APPROVED
Mar 11, 1957
(initialed) C.P.T.
Planning, Design & Eng'rg.

PLAINTIFF'S EXHIBIT NO. 4-C

TO BE ATTACHED TO BUILDING APPLICATION

Feb 18th, 1956

Applicant D'Aprile Bros. Co. Address 1417 Saratoga Av NE
Known as premises 1833 Primrose Rd. N.W. Lots 24 Square N2755
Character of building dwelling. Street improved ///.
Street unimproved, grades applied for Yes. Alley /// None.
Alley unimproved, grades applied for .

DEPOSIT \$	<u> </u>	(sidewalk)
	\$ 97.00	(driveway)
TOTAL	\$ 97.00	

BUILDING APPLICANT - NOTE

The undersigned applicant hereby expresses intent to conform in all respects with Sec. XIV (a) of the Zoning Regulations effective September 8, 1942, dealing with provision of accessible parking space on private property. In case where access to parking space will be from public alley obligation is assumed to grade parking space to such grade as may

be designated by the Inspector of Buildings as suitable to provide access to alley on basis of approved alley grade. In case where access to parking space in similar manner so as to make proper juncture with access driveway at property line, application to install driveway across public space to curb line of roadway to be made, as required, to the Street Division and approval of building application to be contingent upon driveway approval.

Signed D'Aprile Bros Co.

To the Inspector of Buildings:

* * *

Building application indicates that access to parking space will be from a public street. Driveway application has been approved.

/s/ R. Wilson
Inspector, Street Division

PLAINTIFF'S EXHIBIT NO. 4-D

AFFIDAVIT OF OWNERSHIP

I hereby certify that all the land shown on this, the official building plat, filed with application for a building permit in the Central Permit Bureau of the District of Columbia, is owned subject to trusts in its entirety by the undersigned.

/s/

[Jurat 8th day of February, 1957.]

PLAINTIFF'S EXHIBIT No. 5

Form 651-CPB

Permit No. B 21014

BUILDING PERMIT

Date 3/11/57 (Type) BRICK DWELLING

Lot 24 Square N-2755

Location of work 1833 Primrose Rd., N. W.

Total Permit Fee \$55.00

D'Aprile Bros. Co.

(Owner)

Filing Fee \$20.00

No. _____ Date _____

Fee Payable \$35.00

Build One Brick and Stone, and cinder block dwelling as per plans.

Builder - Owner Value \$20,000 No. of Bldgs. 1
 Width of Bldgs. _____ Length _____ Height _____ No. of Stories 3
 Use Dist. Res 40 Area Dist. AR To be occupied as Dwelling
 Height of terrace above grade _____ Projections: _____
 Address of owner 1417 Saratoga Ave. NE Deposit No. _____ Amount \$ _____

WM A ROBINSON

Dep't. of Licenses & Inspections, Gov't. of Dist. of Col.

Inspector's Copy

[reverse side]

(To be filled in by Inspector when job is complete)

Date	Report		Date	Report	[2nd card]
3-21-57	Working		5-23-57	Plastering	100%
3-26-57	passed footing		5-31-57	"	"
4-3-57	Laying bricks	10%	6-7-57	Triming	10%
4-9-57	"	30%	6-11-57	"	"
4-17-57	"	50%	6-20-57	"	40%
4-22-57	"	90%	7-2-57	"	80%
4-25-57	Framing roof		7-10-57	"	80%
4-26-57	roof 95%		7-15-57	"	90%
5-6-57	Close in OK		7-23-57	"	95%
5-9-57	Lathing				100%

This building has been constructed in accordance with the permit and approved plans filed herewith.

/s/ Harry T. Sisk
 Ass't Inspector of Buildings

7-31-57

* * *

[Filed July 9, 1958]

IN THE MUNICIPAL COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROSE BOORSTEIN
5718 Huntington Parkway
Bethesda, Maryland

and

HARRY BOORSTEIN
5718 Huntington Parkway
Bethesda, Maryland

Plaintiffs

vs.

Civil Action No. M21780-58

GENERAL HEATING ENGINEERING
COMPANY, INC., a corporation

Serve: Registered Agent
H. Edward Chozick
848 Warner Building
Washington, D. C.

and

D'APRILE BROTHERS COMPANY
A Corporation

Serve: Registered Agent
Armand D'Aprile
1417 Saratoga Avenue, N. E.
Washington, D. C.

and

DISTRICT OF COLUMBIA

Serve: Robert E. McLaughlin,
President Board of Com-
missioners
District Building
Washington, D. C.

Defendants

C O M P L A I N T

(Negligence - Personal Injuries)

COUNT I.

1. Jurisdiction of this cause is founded on Section 11-755, D. C.
Code, 1951 edition.

2. On or about June 23, 1957, at approximately 11:00 P.M., plaintiff Rose Boorstein was a passenger in an automobile which was owned and operated by her husband, plaintiff, Harry Boorstein. Said automobile was driven on a public highway in the District of Columbia known as Primrose Road, N. W. As said automobile was proceeding in front of premises known as 1833 Primrose Road, N. W. it was caused to fall in an unguarded unmarked and unlighted excavation in the aforesaid public highway.

3. The aforementioned excavation was negligently made, maintained and controlled by the defendants and each of them.

4. As a result of the aforesaid negligence plaintiff Rose Boorstein suffered a whiplash injury of her neck and upper back, strain of the abdominal muscles post traumatic, headaches, hypotension, anxiety and tension and was otherwise bruised and wounded about the body. She was incapacitated in the full performance of her duties and will in the future be incapacitated in the full performance of her duties.

WHEREFORE: Plaintiff Rose Boorstein demands judgment against the defendants and each of them in the sum of \$3,000.00 plus interest and costs of this action.

COUNT II

1. Jurisdiction of this cause is founded on Section 11-755, D. C. Code, 1951 edition.

2. On or about June 23, 1957, at approximately 11:00 P.M., plaintiff Harry Boorstein was driving his automobile on a public highway in the District of Columbia known as Primrose Road, N. W. As said automobile was proceeding in front of premises known as 1833 Primrose Road, N. W. it was caused to fall in an unguarded, unmarked and unlighted excavation in the aforesaid public highway.

3. The aforementioned excavation was negligently made, maintained and controlled by the defendants and each of them.

4. As a result of the aforesaid negligence plaintiff Harry Boorstein suffered contusion of the thorax, strain of the chest muscles, anxiety and tension states with arrhythmia-reactional, situational, post traumatic

and was otherwise bruised and wounded about the body. He has expended and will in the future expend sums of money for medical treatment, medicines and medical supplies for his wife and for himself. He has lost and will in the future lose the services, society, companionship and consortium of his wife. He lost time from his employment and was incapacitated in the full performance of his duties. His automobile was damaged as a result of this occurrence and he lost the use of the same while it was being repaired.

WHEREFORE: Plaintiff Harry Boorstein demands judgment against the defendants and each of them in the sum of \$3,000.00 plus interest and costs of this action.

/s/ Theodore Kligman
Attorney for plaintiffs
333 Investment Building
1511 K Street, N. W.
Washington 5, D. C.

JURY DEMAND

Plaintiffs demand trial by jury as to all issues herein.

/s/ Theodore Kligman
Attorney for plaintiffs

[Filed Aug. 19, 1958]

ANSWER OF DEFENDANT DISTRICT OF COLUMBIA

First Defense

The complaint fails to state a claim against the defendant District of Columbia upon which relief can be granted.

Count I

Second Defense

1. This defendant admits the allegations contained in paragraph 1 of count I of the complaint.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 2 of count I of the complaint, but says that the claimed condition of the roadway did not result from act or omission on its part.

3. This defendant denies the allegations of negligence contained in paragraph numbered 3 of count I of the complaint insofar as they apply to it.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 4 of count I of the complaint.

Count II

This defendant adopts as its answer to paragraphs numbered 1 to 4 of Count II of the complaint the answers given to paragraphs numbered 1 to 4 of Count I of the complaint.

Further answering the complaint, this defendant denies all allegations not specifically admitted or otherwise answered, and denies all negligence attributed to it therein.

Third Defense

This defendant says that if plaintiffs and their property were injured and damaged as alleged in the complaint, said injury and damage were the result of his, her, or their own negligence or contributory negligence, or the negligence of defendant General Heating Engineering Company, Inc., its agent or employees or of defendant D'Aprile Brothers Company, its agents or employees or the joint or concurring negligence of any or all of them.

/s/ Chester H. Gray (initialed GU)
Corporation Counsel, D. C.

/s/ George C. Updegraff
Assistant Corporation Counsel, D.C.

/s/ John A. Earnest (initialed GU)
Assistant Corporation Counsel, D.C.

/s/ Paul Hofflund
Assistant Corporation Counsel, D. C.
Attorneys for District of Columbia
District Building, Washington 4, D.C.

[Certificate of Service]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

ROSE BOORSTEIN and
HARRY BOORSTEIN,

Plaintiffs

vs.

GENERAL HEATING ENGINEERING CO.,
D'APRILE BROS. CO., and
DISTRICT OF COLUMBIA

Defendants.

Civil Action No.
M-21780-58

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Charge of the Court

Date: April 22, 1959

* * * * *

5 Now in this case you will start out with the instruction that the District of Columbia is not an insurer of the safety of users of the public space which it has under its control. The District of Columbia is charged only with the duty of supervising public areas, that is, the streets of Washington, and exercising reasonable care to keep such public space in a reasonably safe condition for its intended purposes, but it is not under an obligation to respond for every accident any person may suffer on those public areas or highways. There are certain rules that you are to follow and you will be instructed with respect to those.

6 You are also told as a matter of law which should govern you in your deliberations that the District of Columbia as a municipal corporation is charged with the duty of supervising the roadways of Washington and keeping them in a condition fit for convenient use and safety against accidents as to travellers using them but it is not under an absolute obligation to respond for every accident a person may suffer on its roadways. You can see how unusual that would be. Your own good common sense will teach you that. The District of Columbia is simply bound to practice due care and diligence in the exercise of its powers and the application of its resources toward the object named. If due care is exercised and notwithstanding an accident occurs and somebody is injured

it is the misfortune of the victim and not the fault of the District of Columbia.

The plaintiff must prove by the preponderance of the evidence as I have told you that it was the negligence of the District of Columbia that caused this accident and that such negligence was the proximate cause of the plaintiff's injury. Now the proximate cause is that cause to which the injury or accident can logically be traced, or stated in another way, it is the cause without which the accident in question would not have occurred.

Now we are going to consider just what negligence would be sufficient for you to base your verdict upon. We have seen in this case that the contractor who made the cut in the road into which the plaintiff husband says his car ran had to make an application to the District of Columbia for permission to make that cut and he got a permit which al-

7 lowed him to make the cut. Among other things this permit that the contractor received to make the cut provided that the contractor, the General Heating Company, will comply with all conditions as set forth herein-- that means in the permit-- as well as within the conditions set forth on the form of application submitted by and on behalf of the permittee in connection with the issuance of the permit.

Now one of the conditions with which you will be concerned on this application is that the repairing and resurfacing of the street where this cut was made will be performed by the District of Columbia at the expense of the applicant. That simply means that the repairs to the roadway can be made only by the District of Columbia and that they are to be made at the expense of the person who made application for the cut.

The person who made the application for the cut, under the provisions as enumerated by the District of Columbia, had no right to repair the top of that road. It had the duty of making the fill there after it made the cut; it had to make what is technically called a back-fill or what to you would be just an ordinary fill; in other words they had to fill up the hole which they had made. They had to fill it in a workmanlike manner.

8

Now, had they filled it in a wrongful manner and the way in which they filled it contributed to the accident which occurred here the contractor would be responsible, but in this particular case we have the evidence that after the cut was made by the General Heating Company, Mr. Yingling had a card which he got from the District of Columbia, and this is the card which was provided by the District of Columbia, its agents, servants or employees. It was directed to the Co-ordinator of Releases, Department of Highways, Room 20, 14th and E Streets, North west. He testified that on the Thursday after the cut was made he mailed this card to the District of Columbia.

The District of Columbia, having provided this postal card, is assumed to have adopted the post office as its agents for the delivery of this card. So when Mr. Yingling delivered this card or a similar card-- he didn't say this card, but a similar card-- into the hands of the Post Office Department, then, so far as the law is concerned, that was in the hands of the District of Columbia, but they are not to act upon this card until they receive it.

9

There is no evidence here as to when they received the post card, so you, exercising your ordinary common sense, are to determine approximately when they received this card. You are instructed that if you find that the thing which caused the hole into which Mr. Boorstein's automobile ran was the failure of the District of Columbia to cover the top of the back fill-- that is, the top of what was put into the hole-- with two inches of black-top or similar materials, within a reasonable time after the receipt of the notice mailed by the witness Yingling on June 13, 1959, and before the accident on the night of June 23, 1959, then the District of Columbia was negligent, and it is liable to Mr. Boorstein, one, for damages to his automobile if any you find; two, for his medical expenses if any you find; and three, for Mrs. Boorstein's medical expenses--that is, Mr. Boorstein-- if you find he paid them and she suffered them, he is the one that is to obtain the benefit of any verdict for that expenditure and not Mrs. Boorstein. And the District of Columbia is liable to both Mr. and Mrs. Boorstein individually for the personal injuries of each including his or her pain and suffering resulting therefrom if any.

Now then, you are to determine whether or not the District of Columbia, as I say, had a reasonable opportunity to cover this cut with a bituminous material which the witness Chism told you about. In determining whether or not the District had a reasonable opportunity you must realize that this card was mailed on a Thursday, and you are to say whether in your judgment you think the District might or did receive it on Friday; or, you are to consider whether or not in your opinion the District of Columbia may have received it on the following Monday, which was the 17th, because we all know that the District of Columbia offices do not operate on Saturday or Sunday.

10 Now if they received it on Friday they had the following week or five days to work on it-- six days including Saturday if they wanted to employ persons on that day so to do. You are to make up your own minds as to whether or not the time that elapsed from the time they may have gotten was a sufficient amount of time to give them a reasonable opportunity to cover this cut that was there.

If you find that they did have reasonable time and that they failed to cover this cut as I have indicated then they are liable. On the other hand, if you believe that they did not have reasonable time and that operating within the bounds of reason for a large concern such as the District of Columbia-- if they did not have a reasonable amount of time then your verdict must be for the defendant.

* * * * *

[Filed November 16, 1959]

PRAECIPE

Boorstein, et al

vs

General Heating Engineering Co., Inc. et al.

)
)
) No. M21780-58
)

The Clerk of said Court will please note that the judgment of the plaintiffs against the District of Columbia has been "paid and satisfied."

/s/ Theodore Kligman
Attorney for Plaintiffs

THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 2627

DISTRICT OF COLUMBIA, a municipal corporation, APPELLANT,

v.

GENERAL HEATING ENGINEERING COMPANY, INC., a corporation,
D'APRILE BROTHERS COMPANY, a corporation, and
ARTHUR G. BRADLEY, APPELLEES.

Appeal from The Municipal Court for the
District of Columbia
Civil Division.

(Argued November 21, 1960

Decided March 30, 1961)

H. Thomas Sisk, Assistant Corporation Counsel, with whom
Chester H. Gray, Corporation Counsel, Milton D. Korman, Principal
Assistant Corporation Counsel, and Hubert B. Pair, Assistant Corporation
Counsel, were on the brief, for appellant.

John F. Mahoney, Jr., with whom Charles E. Pledger, Jr., was
on the brief, for appellee General Heating Engineering Company.

Arthur V. Butler, with whom J. Harry Welch was on the brief,
for appellee D'Aprile Brothers Company.

William J. Donnelly, Jr., with whom Richard W. Galiher and
William E. Stewart, Jr., were on the brief, for appellee Arthur G. Brad-
ley.

Before Hood and Quinn, Associate Judges, and Cayton (Chief
Judge, Retired) sitting by designation under Code §11-776(b).

HOOD, Associate Judge: The District of Columbia brought this
action against appellees to recover the amount of two judgments paid by
it to the plaintiffs in an earlier negligence case. At the close of the Dis-
trict's case appellees' motions for directed verdicts were granted, the
trial court being of the opinion that the issue of appellees' liability to
the District had been determined in the earlier case and could not be raised
again.

In the first action a Mr. and Mrs. Boorstein sued the District of
Columbia, D'Aprile Brothers Company and General Heating Engineering

Company for injuries suffered when their automobile ran into an excavation in the public street. At trial it was shown that the excavation had been made for the purpose of connecting the water main and public sewer to a house then being constructed by D'Aprile Brothers, which had engaged General Heating to do the plumbing and heating work, and the latter had engaged Bradley, a master plumber, to apply to the District for the necessary excavation permits; that the excavation or cut was refilled and packed on June 12, 1957; and that only the District, which was notified of the refilling of the excavation, could repave or resurface the fill. On June 23, 1957, after a heavy rain had apparently washed away a portion of the backfill, the Boorsteins' automobile ran into the excavation and they were injured. Directed verdicts were entered for D'Aprile Brothers and General Heating, but a jury awarded substantial damages to the Boorsteins against the District. No appeal was taken and the District after paying the judgments brought this action.

We agree that the prior action established that, so far as the Boorsteins were concerned, the District was negligent in failing to resurface the cut within a reasonable time, and that the injuries suffered by the Boorsteins did not result from any negligence on the part of either D'Aprile Brothers or General Heating. The question here, however, is whether the District is entitled to indemnity from the results of its own negligence.

The permit for the excavation contained the following indemnity agreement:

"The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify and keep indemnified the District of Columbia from any costs, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent, servant, employee or contractor of the Permittee;* * *"¹

Clearly, the language of the indemnity provision of the permit is "so broad and comprehensive that although it contains no express stipulation indemnifying against a party's own negligence, it accomplishes the

¹ Similar language is found in the application for the permit.

same purpose."² Here a city street was to be cut up for the benefit of private parties. The District, primarily responsible to the public for the safety of the street, was to gain nothing directly from the excavation, except perhaps a law suit. It was not unreasonable for the District to require that it be indemnified against its liability to the public even though such liability arose from its own negligence.

The fact that the District was notified when the backfill was completed and failed within ten days to resurface the fill does not alter the situation. As far as the Boorsteins were concerned, the jury found the ten-day delay on the part of the District to be unreasonable, but it does not follow from this that appellees were relieved of their liability under the indemnity agreement. Notifying the District that the excavation had been filled and was ready for resurfacing did not end appellees' liability. They could not in reason expect the District to immediately resurface and they were well aware that refill in an excavation could settle or wash away and create a dangerous condition. Probably they had the right to demand that the District act within a reasonable time, but we rule as a matter of law that under the indemnity agreement ten days' delay was not unreasonable.

We hold that all appellees were liable under the indemnity agreement. The permit named only D'Aprile Brothers³ and Bradley, and did not name General Heating, but the president of General Heating made it clear that Bradley in applying for the permit was acting on behalf of General Heating. What may be the respective liabilities among the appellees is not before us.

CAYTON, J., dissents.

Reversed with instructions to enter judgment for appellant.

² Princemont Const. Corp. v. Baltimore & Ohio R. Co., D.C. Mun. App., 131 A.2d 877, 878.

³ Actually, the application and permit contained the name of Oliver D'Aprile, but Mr. D'Aprile testified that the property was owned by the D'Aprile Brothers and he, as president of the corporation, was acting for it.

THURSDAY, MARCH 30, 1961

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was

argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, reversed with costs, and that this cause be and it is hereby remanded to the said Municipal Court with instructions to enter judgment for appellant.

Andrew M. Hood,
Associate Judge.

* * * * *

MONDAY, APRIL 24, 1961

The Court met pursuant to adjournment. Present: The Honorable Andrew M. Hood and Thomas D. Quinn, Associate Judges, and Nathan Cayton (Chief Judge, Retired) sitting by designation.

Proclamation being made the Court is opened.

* * * * *

DISTRICT OF COLUMBIA,
a municipal corporation,

Appellant,

v.

GENERAL HEATING ENGINEERING COMPANY,
INC., a corporation, D'APRILE BROTHERS COM-
PANY, a corporation, and ARTHUR G. BRADLEY

Appellees.

No. 2627

On consideration of the motion for rehearing filed by appellees in the above-entitled case, and appellant's opposition thereto, it is Ordered by the Court that the motion be and it is hereby denied.

* * * * *

[Filed May 1, 1961]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL HEATING ENGINEERING COMPANY, INC.	)	
D'APRILE BROTHERS COMPANY	)	
and	)	
ARTHUR G. BRADLEY	)	
	)	
Petitioners	)	
	)	
vs.	)	
	)	
DISTRICT OF COLUMBIA	)	
	)	
Respondent	)	

PETITION FOR ALLOWANCE OF AN APPEAL

Petition is hereby made by General Heating Engineering Company, Inc., D'Aprile Brothers Company and Arthur G. Bradley for allowance of an appeal from the judgment of the Municipal Court of Appeals for the District of Columbia entered on the 30th day of March, 1961, ^{Rehearing denied April 24, 1961} in a cause entitled District of Columbia vs. General Heating Engineering Company, Inc., D'Aprile Brothers Company and Arthur G. Bradley, No. 2627 in said Municipal Court of Appeals, in favor of District of Columbia against said General Heating Engineering Company, Inc., D'Aprile Brothers Company and Arthur G. Bradley.

* * * * *

[Filed Jun 14, 1964]

Before: Edgerton, Bazelon and Burger, Circuit Judges,
in Chambers.

ORDER

Upon consideration of the petition for allowance of an appeal from the Municipal Court of Appeals and of the briefs in support and in opposition, it is

ORDERED by the Court that an appeal from the judgment of the Municipal Court of Appeals in this case is allowed.

Per Curiam.

BRIEF FOR APPELLEE

RECEIVED

SEP 15 1961

CLERK OF THE UNITED
STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

SEP 15 1961

No. 16,325

Joseph W. Stewart

CLERK

GENERAL HEATING ENGINEERING COMPANY, INC.

D'APRILE BROTHERS COMPANY,

ARTHUR G. BRADLEY,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The Municipal Court of Appeals For
The District Of Columbia

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STATEMENT OF QUESTION PRESENTED

In the opinion of appellee, the question presented is:

Where, as a condition precedent to the approval of the applications for a permit to excavate in a public street and the issuance of such permit, the applicant undertook to " * * * insure that such excavation is kept in a safe condition until such street * * * has been repaired or resurfaced by the District of Columbia * * *" and to " * * * save harmless, indemnify and keep indemnified the District of Columbia from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agent. * * * employee or contractor of the Permittee * * *" and, by reason of the negligent maintenance of such excavation, a motorist sustained injuries and recovered damages from the District of Columbia, was not the municipality entitled to be indemnified in accordance with the terms and conditions of the applications and permit?

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CASES CITED

<u>Boorstein, et al. v. General Heating Company, et al.,</u> <u>Civil Action No. M 21780-'58</u>	1, 2, 4, 6
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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

GENERAL HEATING ENGINEERING :
COMPANY, INC., et al., :

Appellants, :

v. :

No. 16,325

DISTRICT OF COLUMBIA, :

Appellee. :

COUNTER-STATEMENT OF THE CASE

The appellee, herein referred to as the District, commenced on July 22, 1959, in the Municipal Court for the District of Columbia an action to recover from the appellants the amount of damages paid in satisfaction of judgments entered against it on April 28, 1959, in the case of Boorstein, et al. v. General Heating Company, et al., Civil Action No. M 21780-'58 in the Municipal Court (J.A. 3-6).

The Boorstein case was an action by Rose and Harry Boorstein against the District and against General Heating Engineering Company, Inc., and D'Aprile Brothers Company, two of the appellants herein, for injuries sustained when their automobile ran into an excavation in the roadway in front of 1833 Primrose Road, N.W. (J.A. 37-39). At

the conclusion of the plaintiffs' case, verdicts were directed for General Heating Engineering Company, Inc., and D'Aprile Brothers Company and, at the conclusion of the trial, the jury returned a verdict in favor of the Boorsteins and against the District, upon which judgments were entered (J.A. 5-6).

The case now on appeal was tried to a jury on April 12, 1960, and, at the conclusion of the District's case, appellants General Heating, Bradley and D'Aprile moved for directed verdicts (J.A. 19-20). Because of its opinion that the judicial determination in the Boorstein case that the District, and not the appellants, were liable for the injuries sustained by the Boorsteins by reason of the dangerous condition of the roadway complained of, the trial court granted the motion and directed verdicts for the three appellants, saying:

" * * * the rules of law which were applicable in the former case, are conclusive of the lack of liability of the present three defendants * * *." (J.A. 21)

From this ruling the District, on April 28, 1960, appealed to the Municipal Court of Appeals which, on March 30, 1961, reversed the judgment of the trial court with instructions to enter judgment in favor of the District, saying:

"Clearly, the language of the indemnity provision of the premit is 'so broad and comprehensive that although it contains no express stipulation indemnifying against a party's own negligence, it accomplishes the same purpose.' Here a city street was to be cut up for the benefit of private parties. The District, primarily responsible to the public for the safety of the street, was to gain nothing directly from the excavation, except perhaps a law suit. It was not unreasonable for the District to require that it be indemnified against its liability to the public even though such liability arose from its own negligence.

"The fact that the District was notified when the backfill was completed and failed within ten days to resurface the fill does not alter the situation. As far as the Boorsteins were concerned, the jury found the ten-day delay on the part of the District to be unreasonable, but it does not follow from this that appellees were relieved of their liability under the indemnity agreement. Notifying the District that the excavation had been filled and was ready for resurfacing did not end appellees' liability. They could not in reason expect the District to immediately resurface and they were well aware that refill in an excavation could settle or wash away and create a dangerous condition. Probably they had the right to demand that the District act within a reasonable time, but we rule as a matter of law that under the indemnity agreement ten days' delay was not unreasonable." [Emphasis supplied] (J.A. 46-47)

Following the denial on April 24, 1961, of a motion for a rehearing, appellants petitioned this Court for allowance of an appeal and, on June 14, 1961, appeal was allowed. (J.A. 49).

In its complaint (J. A. 3-6), the District alleged in substance that the condition complained of in the Boorstein case, an excavation in the public roadway, was made by appellants for their special use and benefit under a permit issued by the District. In their applications for the permit, appellants agreed in writing to the following conditions, among others, which were incorporated therein and also in the permit itself when issued:

THE APPLICATIONS

* * * *

"(3) That the applicant, at the applicant's risk and expense, guarantees that the public space occupied by the applicant or required for the performance of the work authorized by the said permit, at all times will be kept in a safe condition, and where the work aforesaid results in any excavation in any street, alley, sidewalk, or other public space, the applicant will insure that such excavation is kept in a safe condition until such street, alley, sidewalk, or other public space has been repaired or resurfaced by the District of Columbia. * * * [Emphasis supplied]

* * * *

"(5) That the applicant will save harmless, indemnify and keep indemnified the District of Columbia, * * * from all claims, suits, * * * and judgments to which the said District, * * * may be subject on account of injury to persons or damage

to property * * * due to negligence of the applicant
* * * or resulting from failure to observe and
comply with terms and conditions of this application."
(J.A. 22-24, 26-27)

THE PERMIT

"The Permittee, in accepting this permit, expressly agrees, as a condition precedent to the issuance of the permit by the District of Columbia, that the Permittee will save harmless, indemnify and keep indemnified the District of Columbia from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of Public space by the Permittee, or by any agency, servant, employee or contractor of the Permittee; that the Permittee will comply with all conditions set forth herein, as well as with the conditions set forth on the form of application submitted by or on behalf of the Permittee in connection with the issuance of this permit; and that the Permittee will perform the work authorized by this permit in accordance with the application and plan(s) filed therefor, both of which have been approved by and are on file with the District of Columbia, and in accordance with all applicable laws and regulations of the District of Columbia."
(J.A. 30, 31)

At the trial there was no serious dispute as to the facts. The applications, in required form for a permit to excavate in the public roadway, were approved (J.A. 23-27). The permit was issued (J.A. 23, 27). The excavation was made and, on June 12, 1957, was backfilled by

one of the appellants (J.A. 18, 42-44), and, on June 23, 1957, the Boorsteins were injured when their automobile ran into the excavation (J.A. 11).

The excavation in the public roadway was made for the purpose of connecting with the public sewer and water systems a house then under construction at 1833 Primrose Road, N.W. (J.A. 11, 16-19). Appellant D'Aprile owned the premises and appellant General Heating, his contractor, had agreed to furnish all plumbing and heating fixtures and facilities for the house under construction. Appellant Bradley, a licensed master plumber, was employed by appellant General Heating to do all things necessary and incident to effecting the required water and sewer connections (J.A. 11, 16-19, 22, 26, 30, 31).

The judgments entered against the District in the Boorstein case followed a jury finding that the District was negligent in maintaining the roadway at the front of 1833 Primrose Road, N.W., and that such negligence was the cause of the injuries sustained by the Boorsteins (J.A. 11). It was to obtain exoneration for the amount paid in satisfaction of such judgments that the District sought indemnification from the appellants (J.A. 5-6).

SUMMARY OF THE ARGUMENT

Because of the District's non-delegable duty to maintain the public streets in a safe condition, it was neither contrary to public policy nor was it unreasonable to require of appellants, as a condition precedent to the issuance of a permit to excavate in a public street, an agreement (1) to maintain such excavation " * * * in a safe condition until such street * * * has been repaired or resurfaced by the District of Columbia," and (2) to " * * * save harmless, indemnify and keep indemnified the District from any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property * * * " resulting by reason of such excavation.

Since the District was required to pay damages because of injuries sustained by reason of a dangerous condition of such excavation, there arose the very factual situation which was contemplated when appellants subscribed to the conditions precedent imposed, and, under the indemnification terms, the District became entitled to payment from appellants of the loss it sustained.

Moreover, it is the settled law in this jurisdiction that, even absent the indemnification agreement, the District, under the doctrine of implied indemnity, is entitled to indemnification from appellants for the money it was adjudged to pay the injured third persons.

ARGUMENT

I

Because of the District's non-delegable duty with respect to the maintenance of the public streets, it was not contrary to public policy to require of appellants, who desired to excavate therein, an agreement to indemnify the District for any damages it was required to pay to third persons for injuries sustained by reason of such excavation.

Appellants contend first that their agreement to save harmless and to " * * * indemnify and keep indemnified the District of Columbia from any cost, loss, or damage suffered or incurred * * * by reason of any injury to persons or damage to property resulting from the use of public space by the permittee * * *" for the purpose for which the permit was issued, is contrary to public policy.

A short answer to this contention is that given by the Municipal Court of Appeals in its opinion:

"Clearly, the language of the indemnity provision of the permit is 'so broad and comprehensive that although it contains no express stipulation indemnifying against a party's own negligence, it accomplishes the same purpose.' Here a city street was to be cut up for the benefit of private parties. The District, primarily responsible to the public for the safety of the street, was to gain nothing directly from the excavation, except perhaps a law suit. It was not unreasonable for the District to require that it be

indemnified against its liability to the public even though such liability arose from its own negligence."
[Emphasis supplied, footnote omitted] (J.A. 47).

Appellants say, however, that the interpretation of the indemnity agreement by the Municipal Court of Appeals is unreasonable because it permits the District to be indemnified against its own negligence (Appellants' brief, p. 11).

The decision of the Municipal Court of Appeals is, of course, in accordance with well established law in this jurisdiction as declared in The District of Columbia v. The Baltimore and Potomac Railroad Company, 1 Mackey 314, 13 D.C.314; Washington Gaslight Company v. District of Columbia, 161 U.S. 316, 40 L. Ed. 712; Security Savings and Commercial Bank v. Sullivan, 49 App. D.C. 119, 261 F. 2d 461; and The Hecht Company v. District of Columbia, D.C. Mun. App., 139 A. 2d 857. These cases are authority for the proposition that the District is entitled to indemnification from persons using public space for their own use and benefit, when such use results in injuries to third persons for which the District is condemned to respond in damages.

The rationale of such law is that the District has a non-delegable duty to keep the public space safe for its intended use and when, as a result of its negligence in performing such duty, innocent third persons

are injured and the District is condemned to pay damages for such injury, it is entirely reasonable for the District to be indemnified by the person or persons responsible for such condition.

In District of Columbia v. Baltimore and Potomac Railroad Company, supra, the company excavated in a public street of this city for the purpose of constructing a tunnel for its own use and benefit. A pedestrian sustained injuries from a fall into the open excavation and recovered damages from the District, which then commenced an action to recover over from the railroad company. In upholding the judgment entered for the District, the Court said:

"There could have been no recovery against the District in the Barnes suit, except upon the distinct proof of negligence, since a municipality charged with the duty and power to grade and alter the streets of a city is not answerable for injury resulting to a citizen in the performance of such work, unless it be shown that its agents were guilty of negligence in the discharge of this public duty. Barnes accordingly charged expressly in his declaration that the District authorities permitted and allowed K street between 6th and 7th streets, s.e., to remain in a dangerous and unsafe condition, not barricaded, and without light or other signal to give warning to the wayfarer of the deep and dangerous excavation in the street, and that in consequence of such their gross negligence, the plaintiff fell into the opening and sustained the injuries complained of.

"The excavation described was that made by the railroad company in the construction of their tunnel.

With this work the city government had nothing whatever to do. The company alone were constructing it, and it was incumbent upon them to guard it and prevent its becoming a nuisance by being unprotected, at their peril. If the company had properly barricaded it, or warned persons off by proper lights, no accident could have happened, no negligence could have been established against the city, and there could have been no recovery against it." [Emphasis supplied] (13 D.C. 318)

Washington Gaslight Company v. District of Columbia, supra, was an action by the District to recover over from the gas company money it was adjudged to pay a third person injured by reason of tripping over a gas box located in the public sidewalk. When the case came before the Supreme Court, it held that the action was maintainable on the ground that the gas box was installed in the sidewalk by the company for its own benefit, that it had the duty to repair it, and that if the District was held liable to a third person because of a breach of its obligation to maintain the sidewalk in a safe condition, then the District is entitled to recover from the company. The Supreme Court said further that it would be unreasonable to infer that Congress, which permitted the use of public sidewalks and streets for gas company business, contemplated that the District would repair the gas company's apparatus or pay damages for injuries resulting from such apparatus, when the gas company alone profited from the equipment located in public space.

To the same effect was The Hecht Company v. District of Columbia, supra. There a pedestrian, who fell on a sidewalk installed for the benefit and convenience of the company, recovered damages from the District because of its negligence in maintaining the walk. In an action against the company, it was held that the District was entitled to indemnification.

Of similar import is the language of the Supreme Court in Chicago v. Robbins, 67 U.S. 418, 17 L. Ed. 298:

" * * * No license can be presumed from the City to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the City derived no advantage from it, except incidentally, Robbins impliedly agreed with the City, that if he was permitted to dig the area, for his own benefit, that he would do it in such a manner as to save the public from danger, and the City from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations and their rights would have been determined by a different rule of decision from the rights of private persons. Because the City is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act. The City gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was

lost, and it became unlawful, the City is not in fault. * * *"
 [Emphasis supplied] (67 U.S. 425)

To the same effect are: Robbins v. Chicago, 71 U.S. 657, 18 L. Ed. 427; Security Savings and Commercial Bank v. Sullivan, 49 App. D.C. 119, 261 Fed. 461; Princemont Construction Corporation v. Baltimore and Ohio Railroad Company, D.C. Mun. App. 131 A. 2d 877; Burke v. City of New York, 2 N.Y. 2d 90, 138 N.E. 2d 332, and Steely v. City of New York, 157 N.Y. Supp. 2d 734, reversed on other grounds 164 N.Y. Supp. 2d 867.

The cases cited by appellants as supporting their contention that indemnification of the District in this case is against public policy, are readily distinguishable. In Kay v. Cain, 81 U.S. App. D.C. 24, 154 F. 2d 305, principally relied on by appellants, a landlord contended that, because of a clause in the lease which allegedly exempted him from payment of damages caused by "bursting, leaking or overflowing of any water or steam pipes, or other cause whatsoever", he was not liable to a tenant who fell in an unlighted hallway. This Court held that, under the rule of ejusdem generis, the phrase "or other cause whatsoever" referred only to causes which have some resemblance to the particular ones specified in the context of the lease clause, and thus the clause was held to be immaterial.

The Court then observed that it was doubtful whether a lease which undertook to exempt a landlord from responsibility for such negligence would be valid because of the crowded war conditions then existing, and said:

" * * * The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy." (81 U.S. App. D.C. 25)

But, in permitting appellants in the instant case to excavate in the public roadway, the District did not stand to gain as did the landlord from the tenant's rental payments in Kay v. Cain, supra. Here, "[t]he District, primarily responsible to the public for the safety of the street, was to gain nothing directly from the excavation, except perhaps a law suit." (Municipal Court of Appeals opinion, J.A. 47). Under the circumstances it was neither contrary to public policy nor was it unreasonable to require as a condition precedent to the issuance of a permit to excavate in a public street that appellants agree to " * * * insure that such excavation is kept in a safe condition until such street * * * has been repaired or resurfaced by the District of Columbia * * *" and, to " * * * save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees,

and judgments to which the said District, its officers and employees may be subject on account of injury to person or damage to property * * *"
(J. A. 23, 24, 26, 27).

Fairfax Gas and Supply Company v. Hadary, 4th Cir., 151 F. 2d 939, also strongly relied upon by appellants, is distinguishable upon the facts. Hadary was awarded damages sustained as a result of an explosion that occurred when he attempted to light a gas stove. The gas company had installed the stove and left instructions for its operation, knowing all the while that the gas line to the stove leaked and was dangerous. The gas company contended that its contract with Hadary relieved it of liability from damage caused by leakage or explosion. Of this contention the Court said:

"Even then if it be the rule that a purely private contractor may by contract generally relieve itself of liability for mere negligence, such a rule, we think, should have no application to the facts in the instant case. To us, the conduct of Fairfax may certainly be called gross negligence; perhaps we may go further and state that it closely verges on, if it does not actually attain, the quality of wantonness. Our social conscience is shocked at the idea that Fairfax should here be permitted to hide behind the beneficent shield of contract. * * *"
[Emphasis supplied] (151 F. 2d 942.)

As has been demonstrated, it was not unreasonable or contrary to public policy for the District to have required appellants, prior to

excavating in the public roadway, to agree to indemnify the District for damages it was condemned to pay to persons injured by reason of appellants' excavation in a public street for purposes beneficial to them. Furthermore, from the facts and circumstances involved, appellants cannot seriously contend that the District took, or attempted to take, an unreasonable advantage of them since there is no pretense that appellants did anything more than backfill the excavation some ten days prior to the Boorsteins' accident (J.A. 42, 44, 46).

In this connection the Municipal Court of Appeals, in its opinion in this case, observed:

" * * * Probably they [appellants] had the right to demand that the District act [resurface the excavation] within a reasonable time, but we rule as a matter of law that under the indemnity agreement ten days delay was not unreasonable." (J.A. 47)

II

When the District was required to pay damages to third persons because of a condition in the public street resulting from work performed by appellants, there arose the vary factual situation which was contemplated when appellants undertook to indemnify and keep indemnified the District.

Appellants contend next that, even if, under the facts and circumstances here involved, indemnification of the District is not contrary to public policy, the District's action must still fail. Appellants argue that because the language contained in the excavation permit and applications does not expressly relieve the District from liability for its own negligence, they should not be compelled to indemnify the District (Appellants' brief, pp. 16-21). In this regard, appellants cite, and rely principally on, Maiatico v. Hot Shoppes, Inc., ____ U.S. App. D.C. ____, 287 F. 2d 349, and City of Boston v. Boston Edison Company, 1st Cir., 260 F. 2d 872, for the familiar proposition of law that an agreement exempting one from his own negligence must be clearly and unambiguously expressed. But these cases are without application here. In Maiatico, there was an attempt by a tenant, under the terms of the lease involved, to not only exculpate itself from the consequences of its own negligence, but to obtain payment from the landlord for the damage its negligence caused. This Court held that the lease simply did not provide for such a contingency.

In City of Boston, it was held that the city was not entitled to indemnification, under the terms of the agreement involved, because such agreement did not contemplate or provide that the city would be relieved of liability for gross negligence-- such as the city was found to have committed.

In the instant case, the District was adjudged liable to the Boorsteins because of its failure to perform its primary and non-delegable duty toward them. Here, the District is not seeking indemnification from those who were damaged by reason of the District's failure to perform its duty, but from those who guaranteed the District, as a condition precedent to permission to excavate a public street, that they would keep the street safe and save the District harmless until such time as the District could repave the street.

Furthermore, the indemnification agreement involved in this case is clear and unambiguous. For example, in the applications for the permit it is provided that, in consideration of permission to excavate in the public roadway, " * * * the Permittee will save harmless, indemnify and keep indemnified the District of Columbia for any cost, loss or damage suffered or incurred by the District of Columbia by reason of any injury to persons or damage to property resulting from the use of public

space * * *." (J. A. 30) Also, the applications for the permit provided, and such provisions were incorporated into and made a part of the indemnification agreement, that " * * * the applicant will insure that such excavation is kept in a safe condition until such street * * * has been repaired or resurfaced by the District of Columbia * * *," and that, " * * * the applicant will save harmless, indemnify and keep indemnified the District of Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property * * *" (J. A. 22-29).

It is true that the foregoing provisions do not, as to third persons, exempt the District from the consequences of its own negligence as to maintaining public streets, but the broad comprehensive language contained in the agreement accomplished the purpose of imposing upon appellants the obligation to exonerate the District with respect to the damages it was condemned to pay the Boorsteins. Such negligence as the jury imputed to the District in Boorsteins' suit was unquestionably based upon its constructive notice of a dangerous condition created by action initiated by appellants, and it could not possibly constitute a bar to recovery over against appellants on the indemnity agreement. See *Newport News Shipbuilding Company v. United States*, 226 F. 2d 137

and Rice, et al. v. Pennsylvania, (2nd Cir.) 202 F. 2d 861.

To give the indemnification agreement the effect contended by appellants would render it a nullity and would put an end to all liability over to the District in a case such as this. See Chicago v. Robbins, supra, at page 425. Certainly the intent of the indemnification agreement is clear. It must be obvious that the District is never entitled to indemnification until such time as it has been found negligent and condemned to pay therefor. District of Columbia v. Baltimore and Potomac Railroad, supra. And, that is the very factual situation contemplated by such agreement. As demonstrated previously, the right to indemnity under the facts and circumstances disclosed by this record is well established in this jurisdiction. Washington Gaslight Company v. District of Columbia, supra.

Appellants also argue that, under the terms of the indemnification agreement, the only basis upon which the District would be entitled to indemnification is through their established negligence. (Appellants' brief, p. 16). To support their contention, appellants rely on Section (5) of the applications for the excavation permit, which in part provides that the District will be indemnified "due to negligence of the applicant," (Appellants' brief, p. 16). But, the entire provision reads as follows:

"(5) That the applicant will save harmless indemnify and keep indemnified the District of

Columbia, its officers and employees, from all claims, suits, charges, counsel fees, and judgments to which the said District, its officers and employees may be subject on account of injury to persons or damage to property, including property of the District of Columbia, due to negligence of the applicant, or occasioned by work not authorized by said permit, or resulting from failure to observe and comply with terms and conditions of this application * * *." (J. A. 23, 27)

Plainly, the above provision does not limit the District's right to indemnification only to "negligence of the applicant." It also provides for indemnification when the applicant fails "to observe and comply with terms and conditions of * * * [the] application." One condition which appellants completely failed to comply with is found in Section (3) of the application which in part provides:

" * * * [t]hat the applicant * * * will insure that such excavation is kept in a safe condition until such street * * * has been repaired or resurfaced by the District of Columbia * * *" (J. A. 22, 26).

Lastly, appellants should not be heard to protest that they were powerless to protect the Boorsteins from their accident, for they knew or should have known that they could and, by virtue of their agreement, were expected to keep the excavation safe by barricading it, lighting it, refilling it with earth, and covering the refill with some form of temporary covering that would not readily wash out until such time as the District

could permanently repair the surface cut.

The language in District of Columbia v. Baltimore and Potomac Railroad Company, supra, is particularly apposite to the occurrences in this case. There the Court said:

"* * * If the company had properly barricaded it [an excavation for a tunnel], or warned persons off by proper lights, no accident would have happened, no negligence could have been established against the city, and there could have been no recovery against it."
(13 D.C. 318)

III

Even if there had been no express agreement to indemnify the District, under the doctrine of implied indemnity the District is, nevertheless, entitled to recover from appellants the money it was adjudged to pay as damages to third persons.

As previously stated, appellant D'Aprile contracted with appellant General Heating to connect D'Aprile's house with municipal water and sewer lines. General Heating then employed appellant Bradley, a licensed master plumber, who obtained the necessary permit authorizing such use of public space (J. A. 16-19). Later, because of a defective condition of the excavation, made for the sole use, benefit and profit of appellants D'Aprile, General Heating and Bradley, the Boorsteins were injured. The Boorsteins then sued the District, a judgment was entered in their favor, and the judgment has been satisfied (J. A. 42-44).

It has been demonstrated that the evidence presented by the District at trial of the instant case entitled it to recover from appellants the amount it was condemned to pay the Boorsteins on the basis of the indemnification agreement (J. A. 22-31). But, since the excavation made by the appellants in a public roadway was for their special use and benefit, they would, under the doctrine of implied indemnity, be liable over to the District, even if there had been no such agreement.

The law is clear that a person who creates or maintains upon public space anything for his own special use and benefit thereby becomes liable to the municipality if the municipality is condemned to pay a third person for injuries sustained by reason of the existence of that thing. Such liability attaches by operation of law, even without an indemnity agreement, and is bottomed on the proposition that the municipality is primarily liable to the public for reasonably safe maintenance of the streets, that it cannot relieve itself of that liability by delegation, and that, in equity and good conscience, one who, for his own benefit, places a dangerous condition therein, should assume the loss he thereby occasions to the municipality if someone is injured and collects damages therefor. Washington Gaslight Company v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712; Chicago v. Robbins, 67 U. S. 414, 17 L. Ed. 298; Robbins v. Chicago, 71 U. S. 657, 18 L. Ed. 427; Security Savings and Commercial Banks v. Sullivan, 49 App. D. C. 119, 261 F. 149; and The Hecht Company v. District of Columbia, D. C. Mun. App., 139 A. 2d 857.

CONCLUSION

From the foregoing, it is clear that the District of Columbia is entitled to indemnification by appellants for the money it was condemned to pay the Boorsteins. The Municipal Court of Appeals, therefore, was

correct in reversing the Municipal Court with directions to enter judgments in favor of the District of Columbia against appellants.

Respectfully submitted,

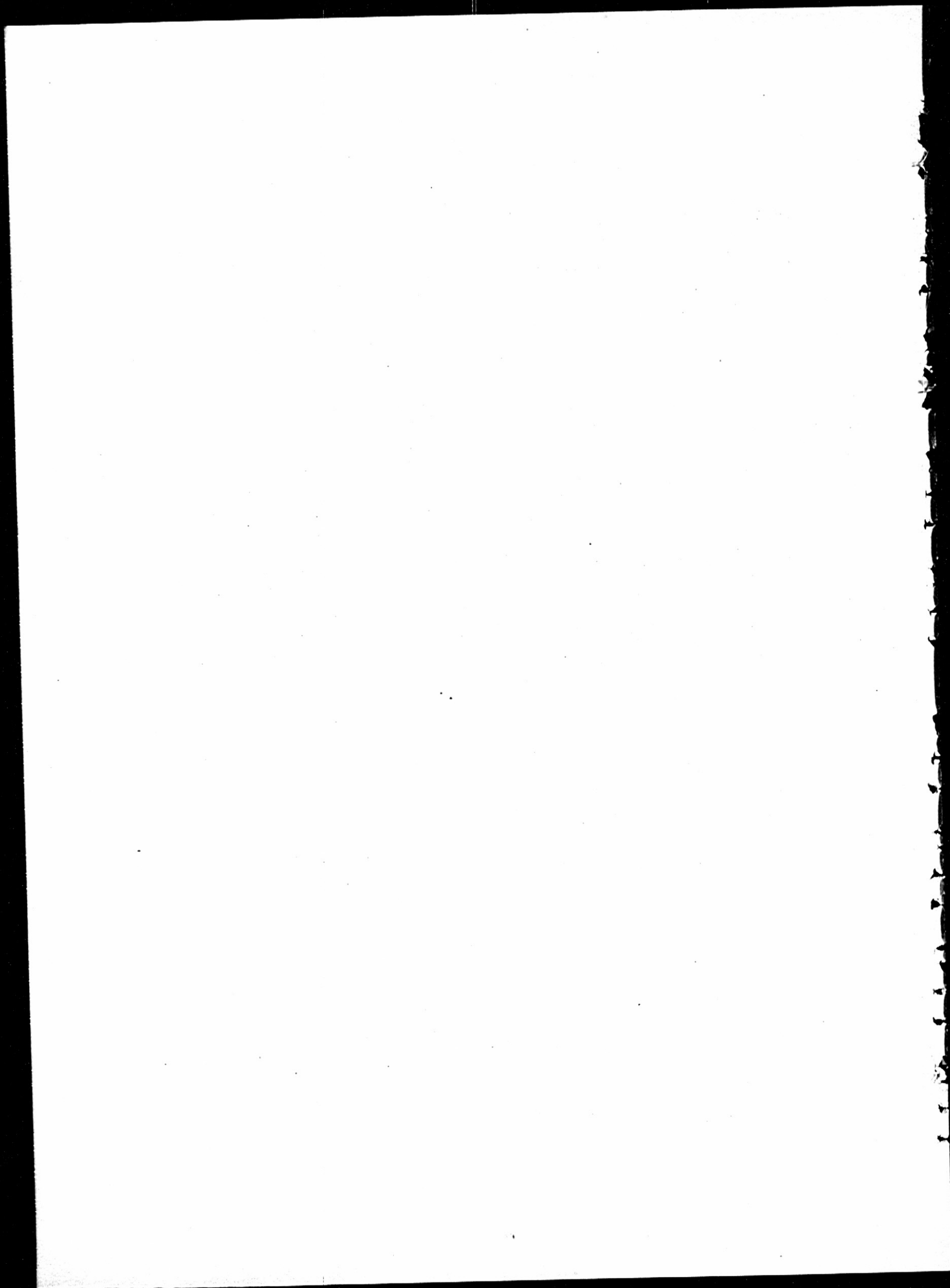
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424

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,325

United States Court of Appeals
For the
District of Columbia Circuit

FILED

APR - 9 1962

GENERAL HEATING ENGINEERING COMPANY, INC.,
D'APRILE BROTHERS COMPANY,
ARTHUR G. BRADLEY,

Joseph W. Stewart
CLERK

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

OPPOSITION TO PETITION FOR REHEARING

For the reasons set forth below, respondent opposes the "Petition for Rehearing by the Division or for a Rehearing En Banc."

Each point relied upon by petitioners as a ground for rehearing was extensively briefed and strenuously urged during oral argument and, it is respectfully submitted, was correctly disposed of by the Court in its opinion and decision entered March 15, 1962.

Counsel for petitioners urge again, and as a ground for rehearing, that the Court erred in not deciding whether the District is entitled to be

"* * * [i]ndemnified [a]gainst [i]ts [o]wn [i]ndependent [n]egligence * * *."

They say this question was squarely before the Court and should have been decided (petition, p. 2).

But, as the Court concluded in its opinion, it was "* * * unnecessary to decide whether the 'broad' indemnity clause in the permit application generally entitles the District to indemnification despite any negligence on its part and despite the contractors' freedom from negligence." * * *

[Footnote omitted.]

What was presented and decided by the appeal was that, under the terms of the indemnification agreement involved, the District could compel petitioners to reimburse it for money it was adjudged to pay third persons injured by an excavation made by petitioners in the public street. The indemnification agreement was incorporated in a permit which authorized petitioners to excavate in a public street for the purpose of connecting to the water and sewer systems a house they were constructing (J. A. 30). As a condition precedent to the issuance of the permit and by its terms, petitioners undertook to maintain the excavation in a safe condition until the District repaired or resurfaced it. And, petitioners undertook further to indemnify the District from any judgment resulting from petitioners' failure to observe and comply with the terms and the conditions of the

permit (J. A. 22-31). In interpreting the terms of the permit, the Court said:

One of the provisions of the permit application imposes an obligation upon the contractors "to insure that such excavation is kept in a safe condition until such street . . . had been repaired or resurfaced by the District of Columbia." That provision demonstrates that the parties anticipated a delay between the contractors' backfilling and the District's resurfacing, and that the delay would endanger the public unless someone was responsible for keeping the cut safe. The permit application, as construed by the Municipal Court of Appeals, places that duty upon the contractors for a reasonable period. In the earlier suit the District's delay in resurfacing was held a breach of its duty to the general public (i. e., negligence). It seems clear to us, however, that this could not determine the scope of the contractors' duty to the District under the cited provision of the permit application. The District did not cross-claim against the contractors in the earlier action. Hence the scope of their duty to the District was not before the court.

We agree with the Municipal Court of Appeals that the permit application must be construed to require the contractors to keep the cut safe only for a reasonable time, and that the ten-day period involved here was reasonable as between these parties. We therefore conclude that appellants' failure to discharge that duty makes them liable to the District under the provision of the application which prescribes indemnification "for all . . . judgments . . . resulting from failure to observe and comply with terms and conditions of this application." [Footnotes omitted.]

Collaterally, petitioners argue that the excavation permit placed an unreasonable burden on them because it required them to keep the excavation safe for a reasonable time, yet prohibited them from taking the necessary steps to do so (petition, pp. 4, 5). But, this is not true. Both the application and the permit contemplated that the petitioners would do whatever was reasonably necessary to maintain the excavation in such a condition as to not endanger public safety. They are being less than fair with the Court when, on page 4 of their petition, they state that they " * * * are not authorized to resurface or repave it [the cut] even with any temporary patch. * * * ." They know, indeed it is common knowledge in the community, that a substance known as "cold pack" is the proper substance for temporarily covering a cut and that its use is, and has always been, permissible.

The Court's decision in this case has ample precedent in the law. See: Chicago v. Robbins, 67 U. S. 418, 17 L. Ed. 298; Robbins v. Chicago, 71 U. S. 657, 18 L. Ed. 427; Washington Gaslight Company v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712; District of Columbia v. The Baltimore and Potomac R. R. Company, 1 Mackey 314, 13 D. C. 314; Security Savings and Commercial Bank, et al. v. Sullivan, 49 App. D. C. 119, 261 F. 2d 461; and, The Hecht Company v. District of Columbia, D. C. Mun. App., 139 A. 2d 857.

For the foregoing reasons and others which are implicit in the Court's decision of March 15, 1962, it is respectfully submitted that the petition for rehearing should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petition for Rehearing was mailed, postage prepaid, this 9th day of April, 1962, to:

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PETITION FOR REHEARING BY THE DIVISION
OR FOR A HEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 16,325

FILED MAR 29 1962

Joseph W. Stewart

GENERAL HEATING ENGINEERING COMPANY, INC.
D'APRILE BROTHERS COMPANY,
ARTHUR G. BRADLEY,

Appellants,

v.

DISTRICT OF COLUMBIA,

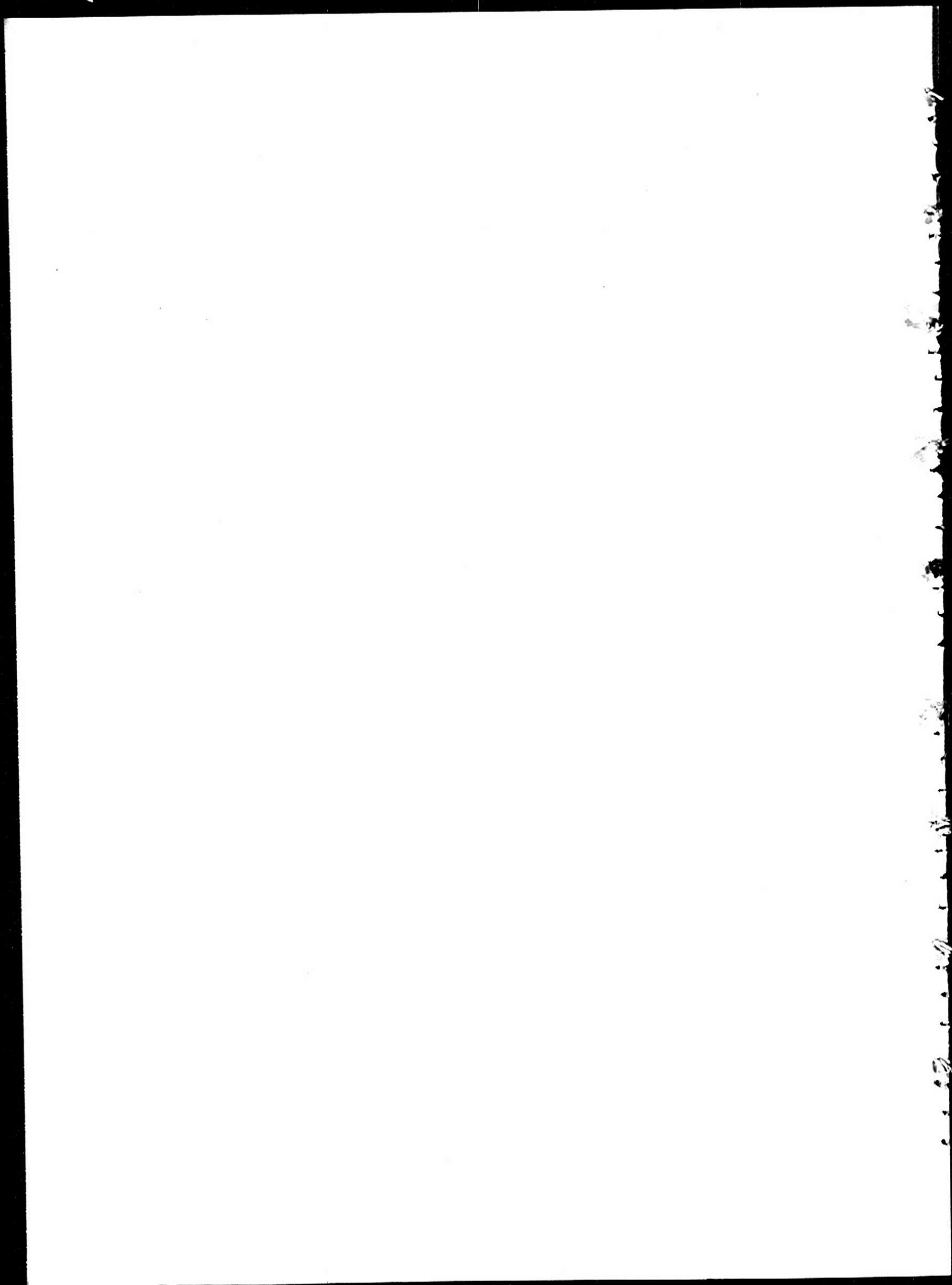
Appellee.

Appeal From The Municipal Court Of Appeals
For The District Of Columbia

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,325

GENERAL HEATING ENGINEERING COMPANY, INC.,
D'APRILE BROTHERS COMPANY,
ARTHUR G. BRADLEY,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The Municipal Court of Appeals
For The District Of Columbia

**PETITION FOR REHEARING BY THE
DIVISION OR FOR A HEARING IN BANC**

For the purposes of this petition appellants will sometimes be referred to as the contractors and appellee as the District.

Appellants move the Court pursuant to Rule 26 of this Court to grant a rehearing by the Division which heard and decided this case, or in the alternative, for a hearing in banc pursuant to 28 U. S. C. A. 46, upon the following grounds which will hereinafter be more fully explained:

(1) The question whether the District can be indemnified against its own independent negligence was squarely before the Court and should be decided.

(2) The inference inescapably drawn from the decision of this Court is in conflict with the tenor of its prior decisions respecting indemnity agreements.

(3) The decision of this case is of such vast importance to the future dealings of contractors with the District of Columbia Government and on this Court's position generally with respect to "broad" indemnity agreements as to warrant consideration by the full Court.

(1) The Question Whether the District Can Be Indemnified Against Its Own Independent Negligence Was Squarely Before the Court and Should Be Decided.

The majority opinion recognizes that the District in the case at bar is the only negligent party and hence the effect of its decision although attempted to be limited in effect, nevertheless will be construed as holding that the District can be indemnified for liability resulting from its own independent negligent acts even against a party who is free from negligence. On p. 2 of the slip opinion, footnote 2, the Court states:

"* * *. But the Municipal Court of Appeals held in the present suit that, as against the injured persons, the first proceeding established the District's negligence and the contractors' freedom from negligence. Since the parties have not objected to the holding, we have assumed its validity for purposes of this appeal. * * *."

Even with this statement as a premise, the majority proceeds to decide the case on the indemnifying language of the permit application alone, prescinding from prior proceedings, judgments and other pertinent provisions of the applications and permits. The issue of indemnity here cannot be decided in the abstract. Nor can it be decided with the factual picture as it is without deciding the questions on which this Court allowed the appeal from the Municipal Court of Appeals.

In deciding the issue of indemnity, the following facts should be considered:

1. The District was found by a jury to be negligent in failing to resurface the cut within a ten-day period as a result of which the plaintiffs Boorstein were injured and recovered Twenty-five Hundred Dollars (\$2500.00) in damages.

2. Under the terms of the applications and permits the District alone had the right to repair or resurface the cut (J.A. 26).

3. The contractors' permit to use public space expired three (3) days before the accident (J.A. 30) and the contractors could not interfere with traffic by putting up barricades without specific permission of the Director of Highways (J.A. 24). (Counsel for the District conceded this in oral argument).

The earlier suit in which the District was determined to be negligent was not appealed. In the subsequent suit for indemnity, however, the Court employs a new and different standard of reasonableness with respect to the District's delay in resurfacing. This period of time is now no longer a question of fact but one of law and decided in favor of the negligent party (P. 8, slip opinion, dissent by Chief Judge Miller):

"* * *. My colleagues flatly say 'the ten-day period (of delay in resurfacing) involved here was reasonable'."

In future cases if ten (10) days delay is reasonable as a matter of law for the District to resurface a filled cut (with respect to applicants only), then is fifteen (15), or twenty (20) days, or a month? For as a practical matter this question will arise frequently with the extensive construction work now in progress in the District of Columbia. Would there be a time when the reasonableness of the delay is no longer a question of law but becomes a question of fact for the jury? The District of Columbia chose not to offer any evidence in either of the cases tried in the Municipal Court to explain the delay.

The majority opinion states that the permit application must be construed to require the contractors (after the job is completed and notice

thereof sent to the District) to keep the cut safe for a reasonable time. But the District in its anxiety to provide the utmost and fullest protection to itself has created a duty in the applicant in one part of the application and in another has denied him the practical means of fulfilling it.

It says in effect, -- keep the cut safe but you are not authorized to resurface or repave it even with any temporary patch and you are not authorized to interfere with traffic or put up barricades without obtaining express permission. How then could the contractors, consistent with their rights and duties under the permit, have prevented the accident complained about? The direct cause of the accident was a washout of part of the filled cut during a rainstorm. The proximate cause, the jury found, was the failure to resurface within a reasonable time. The means to prevent the washout and accident were simple -- application of a temporary asphalt patch to the dirt-filled cut, but the contractors were prohibited from doing this under the terms of the application.

The contractors will concede that if the right were granted to them under the permit application to resurface or repave the filled cut, at least temporarily, the District would have an unquestioned right of indemnity under the facts in this case.

When the terms of an indemnity agreement are considered, so also should the bargaining power of the parties thereto. The District alone drafted these indemnifying clauses for its sole protection. The contractors had no voice in the terms and, practically speaking, they either signed the application as written or they would be denied the right to work on the streets. Therefore, the construction given to the permit and application should in fairness be a reasonable one affording reasonable, not extraordinary, protection to the District. Any other construction may be invalid on the grounds of public policy.¹

Is the construction by the majority reasonable when it would compel

¹ Kay v. Cain, 81 U. S. App. D. C. 24, 154 F. 2d 305 (1946).

a non-negligent contractor to indemnify a negligent municipality for a breach of duty by the latter which the latter had agreed to perform under a permit application it alone drafted?

The majority of the Court do not pass on the question as to whether the indemnity provision is unconscionable and should not be enforced, stating on p. 4 (slip opinion - footnote 5):

"This provision, the contractors say, is unconscionable and should not be enforced because the application prohibits 'interference with traffic unless such interference is specifically authorized by the Director of Highways or his representative' and thereby prevents the applicant from discharging his duty to keep the excavation safe. We have not considered that issue since nothing in the record shows that the contractors sought or required permission to stop traffic."

Does this Court suggest that the contractors apply to the District for permission to interfere with traffic after their work is completed in order to protect the District during the period of delay between the filling of the cut and the resurfacing? Should not the District after notice put up barricades if it deems it necessary, until such time as it resurfaces the area as it agrees to do under the permit application, for only the District knows, under the circumstances prevailing at the time, when it will resurface a particular cut. If, on the other hand, the District allowed the contractors to apply a temporary patch to filled excavations the problem would be nonexistent and, as a matter of fact, so would this lawsuit.

(2) The Inference Inescapably Drawn from the Decision of this Court Is in Conflict with the Tenor of Its Prior Decisions Respecting Indemnity Agreements.

As Chief Judge Miller states in his dissent, p. 8 of slip opinion:

"We granted an appeal from the judgment of the Municipal Court of Appeals. In affirming, my colleagues 'agree that the District is entitled to indemnity in this case' but they do not pass on the validity of the ground upon which the Municipal Court of Appeals based its decision -- that the indemnity agreements protected the indemnitee against its own independent negligence. * * *"

* * * * *

p. 11 -

"* * *. As the District was the only negligent party, the question whether it was indemnified against its own negligence cannot be avoided. * * *."

When the majority opinion is viewed together with the Court's decisions in Maiatico v. Hot Shoppes,¹ Kay v. Cain,² and District of Columbia v. Vignau,³ a confused picture is presented on this Court's position respecting indemnity agreements which purport to indemnify the indemnitee against his own independent negligence. Clearly, in this case we have in fact a negligent party being indemnified from the consequences of its own independent negligence by terms of an agreement which does not expressly, clearly and unequivocally provide for such protection. In Maiatico v. Hot Shoppes, supra, this Court held that indemnity agreements will be strictly construed and a contract of indemnity will not be construed to indemnify the indemnitee against his own negligence unless the intent to so provide is clearly and unambiguously expressed. In Kay v. Cain, supra, this Court indicated that it doubted whether an agreement in a lease which it considered which gives a landlord so great a bargaining advantage over the tenant as to exempt a landlord from responsibility for his own negligence would be valid on the grounds of public policy. Clearly here where there is no bargaining power, as hereinbefore discussed, the agreement, a fortiori may be invalid on grounds of public policy.

In District of Columbia v. Vignau, supra, this Court said (p. 642, 144 F 2d):

"... (A) municipality cannot recover over for damages caused by an obstruction for which it alone is responsible; as where the duty of construction or making repairs is on the municipality and the injuries are caused by defects which it negligently permits to continue ..."

¹ 109 U.S. App. D.C. 310, 287 F. 2d 349 (1961)

² 81 U.S. App. D.C. 24, 154 F. 2d 305 (1946)

³ 79 U.S. App. D.C. 188, 144 F. 2d 641, cert. denied 323 U.S. 781 (1944)

In the case at bar the District went one step further -- it reserved the right to resurface to itself -- then it failed to act !

(3) The Issue in This Case Is of Such Vast Importance to the Future Dealings of Contractors with the District of Columbia Government and on This Court's Position Generally with Respect to "Broad" Indemnity Agreements as to Warrant Consideration by the Full Court.

The majority opinion places an extremely heavy burden on contractors and other persons who must sign an application similar to one in the case at bar in order to excavate in the public streets. If the situation in this case repeats itself (and this is not improbable), a contractor is placed in the awkward predicament of having the means available to prevent an accident, that is, being able to resurface the top of a cut with a temporary patch of asphalt or similar material but being unable to do so because of the reservation of right to resurface to the District in the application he signs, and being unable to interfere with traffic without specific permission of the District, in order to prevent vehicles from falling into a cut that might be washed out during a heavy rain.¹

In sum, the contractors must, at their peril, rely for a reasonable time on the District's diligence in resurfacing the filled cut. This is a harsh, an unreasonable construction of the language of the application and permit, and the result reached is against the weight of authority, which warrants reconsideration by this Court.

For the foregoing reasons it is respectfully submitted that the Petition for Rehearing by the Division or for a Hearing In Banc should be granted.

Respectfully submitted,

CHARLES E. PLEDGER, JR.

¹ The contractors' public space permit expired June 20, 1957, three (3) days before the accident (J.A. 30). Hence, they not only were authorized to interfere with traffic (J.A. 28) but they had no right to perform any work described in the permit.

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I certify, under the provisions of Rule 26 of this Court, that the above petition is presented in good faith and not for purposes of delay.

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Service of a copy of the foregoing Petition for Rehearing by the Division or for a Hearing In Banc is hereby acknowledged this 29th day of March, 1962.

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